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IN THE

Supreme Court of the United States

October Term 1990

JAMES E. BROWN,

Petitioner,

v.

SECRETARY OF THE ARMY

Respondent.

WELLINGTON MITCHELL,

Petitioner,

v.

SECRETARY OF COMMERCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the Back Pay Act, 5 U.S.C. § 5596 *et seq.*, waives the federal government's sovereign immunity for the payment of prejudgment interest on back pay awarded to federal employees denied competitive promotions in violation of Title VII of the Civil Rights Act of 1964.

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No.

JAMES E. BROWN,

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v.

SECRETARY OF COMMERCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James E. Brown and Wellington Mitchell hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-22a), at issue here, is reported at 918 F.2d 214. The court of appeals also issued an opinion in *Brown v. Marsh*, 777 F.2d 8 (1985). The opinions of the district court in *Brown v. Marsh*, are reported at 713 F. Supp. 20 (D.D.C. 1989) (App., *infra*, 25a-39a) and at 729 F. Supp. 864 (D.D.C. 1988) (App., *infra*, 40a-50a), and the order denying reconsideration (App., *infra*, 23a-24a) is not reported. An opinion of the district court in *Mitchell* is reported at 715 F. Supp. 409 (D.D.C. 1989) (App. *infra*, 51a-58a) and the opinion finding liability is not reported (App. *infra*, 59a-66a). The court of appeals also issued an opinion in *Mitchell v. Baldridge*, 759 F.2d 80 (D.C. Cir. 1985).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1990. Petitioners' motion for reconsideration was denied, over the dissent of the chief judge, on February 12, 1991. This petition is, accordingly, filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The Back Pay Act, Title 5, United States Code Annotated, § 5596 (West 1990 Supp.) provides, in pertinent part:

> (b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during the period . . .

(2)(A) An amount payable under paragraph (1)(A)(1) of this subsection shall be payable with interest.

(B) Such interest

(i) shall be computed for the period beginning on the effective date of the withdrawal or reduction involved and ending on a date not more than 30 days before the date on which payment is made;

(ii) shall be computed at the rate or rates in effect under section 6621(a)(1) of the Internal Revenue Code of 1986 during the period described in clause (i); and

(iii) shall be compounded daily.

(C) Interest under this paragraph shall be paid out of amounts available for payments under paragraph (1) of this subsection.

(3) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(4) For purposes of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title, "unfair labor practice" means an unfair labor practice described in section 7116 of this title, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. . . .

STATEMENT

1. Petitioner, James Brown, has been a civilian employee of the Department of the Army continuously for more than twenty years. *Brown v. Marsh*, 777 F.2d 8, 9 (D.C. Cir. 1985). Beginning in 1971, Mr. Brown encountered difficulties from the Civilian Personnel Officer ("CPO") at his post in Worms, West Germany. *Id.* On three separate occasions, between late 1971 and March, 1973, Mr. Brown was dismissed at the direction of the CPO, allegedly because of his race. *Id.* at 910. On each occasion, he successfully contested his removal and obtained reinstatement and back pay. *Id.*

In the wake of this discrimination, Mr. Brown applied for, but was denied, selection to a position of Housing Management Assistant in August, 1975. *Id.* at 11. In September, 1976, Mr. Brown lodged an administrative EEO complaint, challenging, *inter alia*, the denial of promotion. *Id.* at 12. This complaint initiated an administrative process that did not conclude until October, 1985, when the EEOC recommended a finding that Mr. Brown had been the subject of discrimination because of reprisal. (App., *infra*, 43a-44a).

In the interim, on May 8, 1980, Mr. Brown filed this Title VII action *pro se*, relying upon jurisdiction conferred by 42 U.S.C. § 2000e-16 (c) (1982). He alleged, *inter alia*, that he had been denied promotions and other job

benefits in retaliation for his earlier EEO administrative complaints. (App., *infra*, 27a). In May, 1988, the district court granted partial summary judgment to Mr. Brown, and entered an order finding liability against the Army. (App., *infra*, 49a).

In May, 1989, the district court issued an order specifying the remedies to which Mr. Brown was entitled. (App., *infra*, 38a-39a). After finding Mr. Brown to be an "eminently competent employee, and perhaps an exceptional one," (App., *infra*, 29a), the district court awarded him a series of retroactive promotions that it found he would have received absent the Army's discrimination against him. (App., *infra*, 38a-39a). In addition, the court awarded back pay for the salary and other benefits that Mr. Brown would have earned in the absence of the discrimination to which he had been subjected.[1] (App., *infra*, 39a). The district court, however, denied Mr. Brown's request for prejudgment interest on his back pay award. (App., *infra*, 35a-37a). On July 17, 1989, the court declined to reconsider the denial of prejudgment interest. (App., *infra*, 23a-24a).

2. Petitioner, Wellington Mitchell, has been an employee of the National Weather Service, an agency of the Department of Commerce, since January, 1975. (App., *infra*, 59a). After being denied a promotion to a position of Data Base Administrator in 1980, Mr. Mitchell filed this Title VII action, relying upon jurisdiction conferred by 42 U.S.C. § 2000e-16 (c) (1982). *Id.* He claimed that the denial was due to his race. *Id.* After finding that Mr. Mitchell would have been selected for the position absent discrimination, the district court ordered that he be

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[1] Subsequently, the Army computed the gross back pay to which Mr. Brown was entitled to be $137,918.96. Although Mr. Brown's claim to back pay originated in 1975, the award was not paid to him until November 1990.

promoted retroactive to 1980 and awarded back pay.[2] (App., *infra*, 63a). On July 17, 1989, the district court denied Mr. Mitchell's request for prejudgment interest on the award of back pay. (App., *infra*, 53a-57a).

3. The district court denied prejudgment interest to both petitioners on identical grounds. The court acknowledged that the 1987 amendments to the Back Pay Act, 5 U.S.C.A. § 5596 (b)(2)(A) (West 1990 Supp.), had waived sovereign immunity for awards of prejudgment interest to federal employees who prevailed in Title VII cases against the government.[3] (App., *infra*, 36a, 54a-55a). However, the court concluded that petitioners were not entitled to interest, holding that the Back Pay Act applies only where an employee suffers a wrongful withdrawal or reduction of pay, and provides no relief to federal employees who have

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[2] Subsequently, the Commerce Department calculated the back pay to which Mr. Mitchell was due to be $36,659.92. Although Mr. Mitchell's claim to back pay originated in 1980, the award was not issued to him until April, 1991.

[3] In 1987, Congress amended the Back Pay Act to provide for payment of prejudgment interest on awards of back pay to federal employees. The amendment to the Back Pay Act explicitly provides that "[a]n amount payable under . . . this subsection shall be payable with interest." Continuing Appropriations Act of 1988, Pub. L. No. 100-202, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1329, 1428 to 429. This law, enacted on Dec. 22, 1987, applies to actions pending on or after that date. *See* Continuing Appropriations Act of 1988, Pub. L. No. 100-202, § 623 (b), 101 Stat. 1329-1429 (1987). The purpose of this amendment is "to provide full compensation to Federal employees who bring valid claims for back pay by granting a right to collect interest on awards under the Back Pay Act of 1966." H.R. Rep. No. 415, 100th Cong., 1st Sess. 19 (1987).

suffered wrongful denials of promotion. (App., *infra*, 36a-37a, 55a-57a). Relying on *United States v. Testan*, 424 U.S. 392 (1976),[4] the district court rejected petitioners' argument that the 1978 amendments to the Back Pay Act, which expanded the Act's definition of covered personnel actions to include "the omission or failure to take an action or confer a benefit," had extended the Back Pay Act's remedial provisions to the failure to confer benefits such as the denials of promotion at issue here.[5] (App., *infra*, 37a, 56a-57a).

4. The court of appeals affirmed in a split decision. (App. *infra*, 1a-22a). The panel unanimously held that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards."[6]

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[4] In *United States v. Testan*, this Court held that the Back Pay Act did not create a substantive right to back pay for allegedly wrongful civil service classifications. 424 U.S. 392, 407 (1976). The Court stated that the Back Pay Act "was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emolument or position." *Id.*

[5] The amendment reads in pertinent part:

> For purposes of this subsection . . . "personnel action" includes the omission or failure to take an action or confer a benefit.

See Pub. L. No. 95-454, § 702, 91 Stat. 1111, 1216 (1978) (codified at 5 U.S.C. § 5596 (b)(4)).

[6] Respondents had argued that successful Title VII claimants were not entitled to prejudgment interest under any circumstances because Title VII does not contain the requisite waiver of sovereign immunity and the Back Pay Act, which does contain such a waiver, does not apply to

(App., *infra*, 7a). However, the majority rejected petitioners' claim for interest, albeit on grounds different from those set forth by the district court. Adopting what was, in its own words, a "less than fully satisfying" reading of the Act (App., *infra*, 14a), the majority concluded that the Back Pay Act affords relief for the denial of "noncompetitive, mandatory" promotions, but not for the competitive promotions denied to petitioners (App., *infra*, 10a).

The majority characterized its interpretation of the Back Pay Act as a "reconciliation" (App., *infra*, 10a), "a path between two impassable obstacles: ignoring the 1978 amendment because no 'failure . . . to confer a benefit' will ever satisfy the 'withdrawal or reduction' requirement; or ignoring the original, unrepealed mandate that there be a 'withdrawal or reduction' in compensation."[7] (App., *infra*, 14a). According to the

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Title VII discrimination claims. (App., *infra*, 3a.) They contended that *Brown v. General Services Administration*, 425 U.S. 820 (1976) and *Great American Savings & Loan, Ass'n v. Novotny*, 442 U.S. 366 (1979) held that Title VII is the exclusive framework under which a federal employee may obtain relief for employment discrimination, thus barring application of other statutes to discrimination claims. The court rejected respondents' position, noting that the Back Pay Act -- unlike § 1981 and § 1985(3), the statutes at issue in *Brown* and *Novotny* -- creates no alternative cause of action circumventing Title VII's precise time frames and detailed administrative procedures. Rather, "the Back Pay Act is an auxiliary measure that leaves the structural framework of Title VII intact and fully applicable." (App., *infra*, 6a).

[7] The majority acknowledged that *Testan* rested upon the "withdrawal or reduction" language in the statute and viewed the holding of *Testan* with regard to classification actions to have been "untouched" by the 1978

majority, the Back Pay Act only affords relief to federal employees denied "virtually automatic, noncompetitive" promotions, for only those employees can be deemed "duly appointed" to the higher position and, therefore, suffer a "withdrawal or reduction" in compensation when the promotions are denied. (App., *infra*, 13a). The majority stated that its interpretation of the Act was based on Comptroller General opinions and Civil Service Commission ("CSC") regulations upon which Congress expressly relied in its 1978 amendment of the Act.[8] (App., *infra*, 10a-11a). According to the majority, these authorities permitted back pay and interest to be awarded for denials of promotions only where nondiscretionary provisions, such as regulations or collective bargaining agreements, mandated the promotion.[9] The denial of a

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amendments to the Back Pay Act. (App., *infra*, 9a-10a).

[8] The Senate Report states that the amendments "reflect the broader interpretation of the statute that has been given the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulations." S. Rep. No. 969, 95th Cong., 2d Sess. 114, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2836.

[9] The majority cited one Comptroller General opinion, *In re John Cahill*, 58 Comp. Gen. 59 (1978), in support of its interpretation of the Act. (App. *infra*, 10a-11a). *Cahill* merely provides that regulations or provisions of collective bargaining agreements may limit the discretion of an agency, thereby requiring promotions and the award of back pay for the denial of those promotions in circumstances that were not present in that case. (App. *infra*, 10a-11a). The majority also relied on *Spagnola v. Stockman*, in which the Federal Circuit stated that the 1978 amendments to the Back Pay Act authorized only those additional payments or benefits required by law or regulation. 732 F.2d 908, 912 (Fed. Cir. 1984) (App.,

competitive promotion, the court asserted, could not meet such a requirement,[10] because the respondent agencies "in their discretion, could have decided to eliminate, or not to create the sought after positions." (App., *infra*, 13a). Thus, petitioners had no right to their respective promotions and, accordingly, no remedy under the Back Pay Act. (App., *infra*, 13a-14a).

Chief Judge Wald dissented on essentially two grounds from the majority's holding that the Back Pay Act does not encompass denials of competitive promotions in

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infra, 12a-13a). None of these authorities cited by the majority make the distinction between competitive and noncompetitive promotions found in its opinion.

[10] The majority concluded that denials of competitive promotions could not meet the requirements of the regulations on which Congress expressly relied in amending the Back Pay Act in 1978, which defined an "unjustified or unwarranted personnel action" to include an act of

> omission . . . which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differentials . . . otherwise due an employee.

5 C.F.R. § 550.802 (1977) (App., *infra*, 11a). A "nondiscretionary provision" was defined by the CSC as

> any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria.

Id. (App., *infra*, 11a).

violation of Title VII. First, she found that the legislative history of the 1978 amendments fully resolved any tension perceived by the majority in the Act's provisions, thereby obviating the majority's admittedly strained holding. (App., *infra*, 16a). Judge Wald cited the Senate Report, which explained that the amended Act provided coverage for any employee found to have suffered a "'withdrawal, reduction, *denial, or denial of an increase in'* all or part of an employee's compensation," that would not have occurred but for an unwarranted personnel action taken by the agency.[11] (App., *infra*, 16a). Second, the chief judge concluded that even if the Act were to apply only where agency action is mandated by law, competitive promotions denied in violation of Title VII satisfy that standard. According to Judge Wald, Title VII's unequivocal prohibition against the denial of promotions because of race or reprisal provides the mandatory legal requirement needed to establish coverage by the Back Pay Act. (App., *infra*, 18a-20a). Moreover, the finding required to award a promotion retroactively under Title VII that an employee would have been promoted but for discrimination falls squarely within the CSC's definition of "nondiscretionary" action by requiring a federal employer to take a required action, the promotion of the employee, where the failure to promote violated Title VII. (App., *infra*, 19a-20a).

REASONS FOR GRANTING THE PETITION

This case presents an issue of substantial public importance concerning the scope of the Back Pay Act of 1966, as amended, a comprehensive civil service statute affecting all federal employees. In 1987, the Back Pay Act was amended to provide that back pay awarded under the

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[11] Citing S. Rep. No. 969 at 115, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 2837 (emphasis added).

Act would be payable with interest.[12] While there is no question that prejudgment interest is now available where the Act would otherwise award back pay, (App., *infra*, 7a), the issue here is whether the Act permits awards of back pay and interest where federal employees are denied competitive promotions in violation of Title VII.[13]

The federal agencies charged with interpreting and implementing the Back Pay Act have consistently awarded back pay under the Act where appropriate administrative authorities find that a federal employee would have been selected for a promotion absent an unwarranted personnel action. In contrast, the federal circuit courts are divided over the applicability of the Act to unlawful denials of promotion. While the United States Court of Appeals for the Federal Circuit and its predecessor, the United States Court of Claims, have followed the agencies' interpretation that back pay may be awarded under the Act for the unwarranted denial of a promotion that a federal employee would otherwise have received, the U.S. Court

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[12] *See supra* note 3.

[13] The denial of interest to federal employees would also deprive them of a remedy that is routinely awarded as makewhole relief to private employees under Title VII. *See Loeffler v. Frank*, 468 U.S. 549, 558, 563-64 (1988). And, the substantial delays encountered by federal employees in adjudicating claims under Title VII underscore the importance of prejudgment interest as a remedy to make whole proven victims of discrimination. For example, in Fiscal Year 1988, the latest year in which the EEOC has published this data, the average time required for all agencies covered by Title VII to adjudicate administrative claims of discrimination fully was 607 days and ranged from 1,631 days to 228 days. EEOC, *Report on PreComplaint Counseling and Complaint Processing by Federal Agencies for Fiscal Year 1988*, at 33-34.

of Appeals for the Tenth Circuit has held that denials of promotion may never be remedied under the Back Pay Act. The decision of the court of appeals here falls somewhere in between, finding coverage for some promotion denials but not for the competitive promotions denied to petitioners in this case. Review by this Court is necessary to resolve the split in the circuits and to provide direction to the lower courts in a complex area which has proved especially susceptible to inconsistent and divergent results. Plenary consideration is also warranted because the decision of the court of appeals cannot be reconciled with the language and legislative history of the Back Pay Act, as amended in 1978.

1. Congress enacted the Back Pay Act in 1966 as a comprehensive uniform scheme for awarding back pay to federal employees subject to erroneous personnel actions.[14] The Act was designed to "put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place."[15] The language of the statute provided for an award of back pay for an employee found by appropriate authority to have undergone an unjustified personnel action which resulted in the "withdrawal or reduction" of all or part of the employee's pay. 5 U.S.C. § 5596(b)(1). The statute did not explicitly set forth the specific types of personnel actions it covered,[16] instead authorizing the

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[14] H.R. Rep. No. 32, 89th Cong., 1st Sess. 1 (1965).

[15] S. Rep. No. 1062, 89th Cong., 2d Sess. 1, *reprinted in* 1966 U.S. Code Cong. & Admin. News 2097.

[16] *Id.* at 2099. The Senate Report accompanying the Act noted that "separations, suspensions and demotions constitute the great bulk of cases in which employees lose pay or allowances," but also stated that the bill "assures credit for increments such as periodic within grade increases and general pay raises to which the employee

Civil Service Commission ("CSC") to prescribe those actions through the promulgation of appropriate regulations. 5 U.S.C. § 5596 (c).

In 1978 the Back Pay Act was amended to "reflect the broader interpretation of the statute that ha[d] been given the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulations."[17] As of 1977, the CSC and the Comptroller General were applying the Back Pay Act to award retroactive promotions and back pay to federal employees denied selection for competitive promotions in violation of applicable law, where the employees would have been selected for the promotions absent the violation.[18]

The 1977 CSC regulations interpreting the Back Pay Act defined "unjustified or unwarranted personnel actions" to include acts of omission as well as commission, and construed the "withdrawal or reduction" language in the statute to include the "withdrawal, reduction, or *denial* of all or any part of the pay otherwise due an

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would have been entitled had he not been subject to the unjustified or unwarranted action." *Id.*

[17] S. Rep. No. 969, 95th Cong., 2d Sess. 114, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2836; *see also Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed. Cir. 1984) (discussing legislative history of 1978 amendments).

[18] Prior to the 1987 amendments to the Act, which waived the federal government's sovereign immunity from prejudgment interest, the award of interest was unavailable for any unjustified or unwarranted personnel actions under the Act, including denials of competitive promotions. *See supra* Note 3.

employee."[19] 5 C.F.R. § 550.802(c) (1977) (emphasis added). The Federal Personnel Manual ("FPM") extant in 1977 which provided a detailed explanation of the regulations promulgated by the Commission in furtherance of the Act also set forth a nonexclusive list of personnel actions covered by the Act, including, among others, the failure to promote in accordance with a nondiscretionary provision in a collective bargaining agreement, an Executive order, or a regulation. Federal Personnel Manual (hereinafter "FPM") Supp. 9902, Book 550, Subch. 8, § 8-5 (1977).

Thus, the 1977 FPM provided that, for an employee to be entitled to back pay, "it must clearly be established that, *but for* the unjustified or unwarranted personnel action, the employee would actually been entitled to receive the pay . . . in question." *Id.* at § 8-4; App., *infra*, 67a. Citing decisions of the Comptroller General, the Manual stated that a federal employee would be entitled

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[19] 5 C.F.R. § 550.802 (1977) read in pertinent part

> (c) 'An unjustified or unwarranted personnel action" means an act of commission (i.e., an action taken under authority granted to an authorized official) or of omission (i.e., nonexercise of proper authority by an authorized official) which it is subsequently determined violated or improperly applied the requirements of a nondiscretionary provision, as defined herein, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differential, as used here, otherwise due an employee. . . .
>
> (d) 'Nondiscretionary provision' means any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria.

to back pay if it was clearly established under applicable law that "the employee would have been selected for the promotion, *but for* the unjustified or unwarranted personnel action." FPM Supp. 9902, Book 550, Subch. 8, § 8-4 (1977) (citing Comptroller General decision B-180010, December 2, 1974, 54 Comp. Gen. 435; *id.* B180010, March 19, 1975) (emphasis in original); App., *infra*, 67a. Accordingly, the FPM made clear that "nondiscretionary" provisions were not limited to situations in which the promotions were granted automatically.

The 1977 FPM also provided that a retroactive promotion and the accompanying back pay may be awarded where an aggrieved employee would have been promoted but for an unjustified personnel action.[20] FPM Supp. 990-2, Book 550, Subch. 8, § 8-6 (1977). Here the Manual relied on 54 Comp. Gen. 312 (1974), in which the Comptroller General affirmed an arbitrator's award of retroactive promotion and back pay because the agency had "admitted that had it not been for the unjustified or unwarranted personnel action the employee later promoted to the position would have been promoted originally."[21] *Id.* at 319; App., *infra*, 77a.

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[20] Under the interpretation of the Back Pay Act by the CSC and Comptroller General, back pay, as well as retroactive promotions, could also be awarded where administrative or clerical errors occurred that would prevent a promotion from taking place as originally intended, deprive an employee of a right to promotion guaranteed by statute or regulation, or fail to carry out a nondiscretionary administrative regulation, or provision in a collective bargaining agreement requiring the promotion under certain circumstances. *See* FPM Supp. 990-2, Book 550, Subch. 8, § 8-6 (1977); 55 Comp. Gen. 42 (1975).

[21] The arbitrator found that the NLRB's General Counsel had violated a collective bargaining provision

When Congress amended the Act in 1978, it sought to incorporate these interpretations by the CSC and Comptroller General by amending the definition of unwarranted "personnel action" to include the "omission or failure to take an action or confer a benefit." *See* 5 U.S.C. § 5596(b)(4).[22] The Senate Report accompanying the legislation described the new law as providing coverage for any employee found by appropriate authority to have a suffered "a withdrawal, reduction, *denial, or denial of an increase in*, all or part of the employee's pay . . . . which would not have occurred but for an unjustified or unwarranted action taken by the agency."[23] S. Rep. No. 969, 95th Cong., 2d Sess. at 115, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2837. (emphasis added) The Senate Report also explained the effect of the

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when he filled a competitive vacancy by selecting an applicant from outside the agency. The provision required that vacancies be filled by promotion or reassignment of persons already employed in the agency, provided their qualifications were equal to those of outside applicants. *Id.* at 313. Other Comptroller General opinions awarding back pay under the Back Pay Act where competitive promotions were unlawfully denied include 55 Comp. Gen. 427 (1975) and 54 Comp. Gen. 435 (1974) (App., *infra*, 80a).

[22] The amendments were enacted as section 702 of the Civil Service Reform Act. *See* 92 Stat. 1111, 1216, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2837.

[23] Although the Civil Service Reform Act went to Conference Committee, no changes to § 702 of the Senate Bill were reported in the Conference Report or reflected in the final bill. *See* H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 2823, 2860.

amendments, noting that the Act now "provides for directing a promotion to a higher level position when such an order would effectuate the make whole purposes of the Act." *Id.*

The Office of Personnel Management, charged with promulgating regulations to implement the 1978 amendments to the Act, did so in accordance with this legislative history.[24] The revised FPM, like its predecessor, explained that federal employees are entitled to back pay for the wrongful denial of competitive promotions where they would have been selected had the unwarranted denials not occurred. FPM Supp. 990-2, Book 550, Subch. 8, § 8-5, at 550-61 (1984).

Since 1978, the Federal Labor Relations Authority ("FLRA")[25] has also recognized the availability of retroactive promotions and back pay under the Back Pay Act where competitive promotions were wrongfully denied to federal employees.[26] In *Veterans Admin. Hosp.*

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[24] The regulations permit recovery under the Back Pay Act when an unjustified or unwarranted personnel action results "in the withdrawal, reduction, or *denial* of all or part of the pay" otherwise due an employee, just as the preamendment Civil Service Commission regulations had done. *See* 46 Fed. Reg. 58272 (1981), codified at 5 C.F.R. § 550.804(a) (1991) (emphasis added).

[25] The FLRA is charged with overseeing the labor relations between federal employees and executive agencies. *See* 5 U.S.C. § 7101 (1982). It has authority to review arbitral awards and set them aside where they are inconsistent with federal law. *Id.* § 7122.

[26] Indeed, pursuant to 5 U.S.C.A. § 5596 (2)(A), the FLRA has awarded prejudgment interest to persons unlawfully denied promotions. *See, e.g., U.S. Dept. of Health & Human Services v. American Federation of*

v. Am. Fed'n of Gov't Employees, for example, the arbitrator found that the employing agency had contravened the applicable merit promotion plan when it denied a promotion to the grievant. 4 FLRA 419, 419 (Sept. 30, 1980). As relief, the Arbitrator awarded the grievant a retroactive promotion and full back pay. *Id.* at 420. In sustaining the award, the FLRA noted that

> [I]t is well established that the Back Pay Act provides the appropriate authority to remedy an unjustified or unwarranted personnel action that has denied an aggrieved employee a promotion that the employee would otherwise have received.

Id. at 424. The key to the proper award of back pay, the FLRA reasoned, is the determination not only that the promotion was unlawfully withheld but also that, in the absence of the improper action, the employee would have received the promotion.[27] *Id. See also Nat'l Treasury Employees Union v. U.S. Customs Serv.*, 32 FLRA 1141, 1149 (Aug. 31, 1988).

The Equal Employment Opportunity Commission too has awarded retroactive promotions and back pay to federal employees who would have been promoted absent

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Government Employees, 35 FLRA 491, 497 (April 10, 1990).

[27] Elsewhere, in applying this same standard, the FLRA has overturned an award of back pay where the arbitrator found only that the employee was entitled to special consideration for the lost promotion, not to the promotion itself. *Picatinny Arsenal v. Nat'l Fed'n of Fed. Employees*, 7 FLRA 703 (Jan. 18, 1982). Similarly, in *Action v. Action Employees Union* the FLRA overturned an award of back pay where the arbitrator failed to find that, but for the unlawful action, the employee would have received the promotion at issue. 11 FLRA 514 (March 9, 1983).

discrimination. Until 1987, when the Back Pay Act was amended to provide for the award of interest, the availability of back pay under Title VII left the EEOC with no need to rely on the Act to grant relief to victims of employment discrimination. After December, 1987, however, the EEOC has relied on the Back Pay Act to grant interest on awards of back pay to federal employees discriminatorily denied promotions under Title VII.[28] *See, e.g., Hall v. Lyng*, EEOC No. 05880912 at 3 (Dec. 29, 1988). Thus, the federal agencies charged with interpreting and implementing the provisions of the Back Pay Act have consistently and continuously interpreted the Act to apply where applicable laws have been violated, causing a federal employee to lose a promotion the employee otherwise would have received.

2. Unlike the federal agencies, federal courts interpreting the scope of the Back Pay Act's coverage have been divided over the applicability of its provisions to denials of promotion. Prior to the 1978 amendments, there were few cases construing the scope of the Act. In 1976, this Court considered whether the Back Pay Act afforded retroactive relief to a federal employee who claimed his position had been improperly classified. The Court held in *United States v. Testan* that the Back Pay Act did not create a substantive right to back pay for allegedly

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[28] Current EEOC regulations provide that as part of "make whole" back pay relief, "[i]nterest should be computed on all" back pay due a federal employee. 29 C.F.R. § 1613 app. A (1990). *See also* 29 C.F.R. § 1613.271(c)(1)(1990) (incorporating Back Pay Act's methodology for computing back pay as set forth at 5 C.F.R. 550.805). However, in a proposal that is still pending, the EEOC has announced its intention to withdraw its regulation providing for the award of interest at the insistence of the Department of Justice. *See* Notice of Proposed Rulemaking, 54 Fed. Reg. 45747, 45751 (Oct. 31, 1989).

wrongful civil service classifications.[29] 424 U.S. 392, 407 (1976). According to this Court, the Back Pay Act "was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emolument or position." *Id.* Although *Testan* concerned job reclassifications, subsequent federal court decisions extended its holding to deny retroactive promotions and back pay in cases involving failures to promote. *See, e.g., Donovan v. United States*, 580 F.2d 1203, 1207-08 (3d Cir. 1978); *McNutt v. Hills*, 426 F. Supp. 990, 1002 (D.D.C. 1977); *Predmore v. Allen*, 407 F. Supp. 1067, 1072-74 (D. Md. 1976).

The 1978 Back Pay Act amendments took special note of *Testan*, incorporating it into the Act in a new provision specifically excluding coverage of reclassification actions.[30] 5 U.S.C. § 5596 (b)(3). While the amended

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[29] The 1977 Federal Personnel Manual provided that "[t]he reclassification of a position is to be considered prospective except to the extent that a retroactive promotion may be provided for under classification appeal regulations." FPM Supp. 990-2, Book 550, Subch. 8, § 8-6, at 550-63. It also stated that "when, through the accretion of duties an employee performs at a grade level higher than the grade he holds, he is not entitled to the salary of the higher position unless and until he is successful in obtaining reclassification of his position and his promotion to the higher grade." *Id.* at § 86, 55064.

[30] The Senate Report to the bill notes that the amended Act "specifically recogniz[ed] the Supreme Court decision in *United States v. Testan*." S. Rep. No. 969, 95th Cong., 2d Sess. at 115, *reprinted in* 1978 U.S. Code Cong. & Admin. News 2723, 2836-37. The Federal Personnel Manual revised after the 1978 Amendments also refers to *Testan* in its section explaining the exclusion of reclassification actions from coverage under the Act. *See* FPM Supp. 9902, Book 550, Subch. 8, § 8-5, at 550-62

Act would offer retroactive promotions and back pay for federal employees unlawfully denied promotions they otherwise would have received, it would provide no remedy for employees seeking retroactive relief because their positions had been misclassified.

Since the 1978 amendments, the circuit courts of appeal have reached conflicting results concerning whether the Back Pay Act applies to promotions at all and, if so, whether denials of competitive promotions fall within its provisions. The U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Claims have interpreted the Back Pay Act in accordance with CSC regulations, the FPM, and Comptroller General Opinions construing denials of competitive promotions as within the scope of the Act. In contrast, the U.S. Court of Appeals for the Tenth Circuit, relying upon *Testan*, has held the Back Pay Act simply does not apply to any denials of promotion. In yet a third approach, the majority below recognized that the Back Pay Act applies to some denials of promotions, but refused to award relief where competitive promotions are unlawfully withheld.

In *Power v. United States*, the United States Court of Claims recognized that a federal employee would be entitled to a retroactive promotion and back pay under the Back Pay Act where it was "'clearly established' that the promotion would have occurred but for the improper personnel action." 597 F.2d 258, 262 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1044 (1980) (citing FPM Supp. 9902, Book 550, Subch. 8, § 8-4(b)(2) (1977)). Because Power had not "clearly established" that he would have been promoted, the court denied him a retroactive promotion and back pay. 597 F.2d at 262. Following its predecessor's interpretation of the Act, the Federal Circuit, in *Naekel v. Department of Transportation*, 850 F.2d 682 (1988), also denied retroactive relief where a

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(1984).

federal employee failed to prove he would have been promoted absent an unlawful separation. *Id.* at 684. In affirming the Merit System Protection Board's denial of retroactive promotions and back pay to Naekel, the Federal Circuit relied on FPM provisions stating that "promotion and back pay are inappropriate if the . . . factual record did not clearly establish that the employee would have been selected for the promotion." *Id.* at 684 (citing FPM Supp. 9902, Book 550, Subch. S8-5 at 550-61 (1984).[31]

The United States Claims Court, and federal district courts in California, Georgia and Washington state, have also determined that the Back Pay Act affords retroactive relief for unlawful denials of promotions that a federal employee would otherwise have received. *See Kellus v. United States*, 13 Cl.Ct. 538 (1987) (competitive); *Smith v. Brady*, 744 F. Supp. 925 (N.D. Cal. 1990); *Parker v. Burnley*, 693 F. Supp. 1138 (N.D. Ga. 1988) (competitive); *Rollins v. Bennett*, 48 F.E.P. (BNA) 1172 (W.D. Wash. 1988) (competitive).

The Court of Appeals for the Tenth Circuit, in contrast to the decisions cited above, has defined the scope of the Back Pay Act even more narrowly than the D.C. Circuit below by excluding all denials of promotion from coverage. In *Olsen v. Arrington*, 621 F.2d 363 (1980), the Tenth Circuit held that it lacked the authority to award a retroactive promotion and back pay to a federal employee

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[31] The dissent would have awarded the retroactive promotions and back pay based on its conclusion that the facts did "establish that Naekel would have been promoted, but for the unjustified removal." *Naekel*, 850 F.2d at 864. The split over this factual issue notwithstanding, the panel unanimously concluded that unlawfully denied promotions are covered by the Back Pay Act where the claimant would otherwise have been selected.

who claimed that but for a wrongful separation he would have been promoted. Although the court found it likely that the employee would have received the promotion, *id.* at 365, it read *Testan* as prohibiting relief under the Back Pay Act unless an employee had suffered a reduction in position. *Olsen*, 621 F.2d at 366. *See also Hearn v. Turnage*, 739 F. Supp. 1312, 1313 (E.D. Wis. 1990) (court reluctantly denying award of prejudgment interest on back pay awarded to a federal employee who prevailed in Title VII action, reading *Testan* to limit Back Pay Act relief to reductions in duly appointed emoluments or position).

Review by this Court is necessary to resolve the split between the agencies and courts, and among the circuit courts themselves, as to whether the Back Pay Act applies to promotion denials. If coverage does exist, this Court must then resolve the conflict in the circuits and lower courts over the scope of that coverage.

3. Plenary consideration of the decision below is also warranted to conform it to the language and legislative history of the Back Pay Act on which it purportedly relies. As set forth in the CSC regulations and Comptroller General decisions upon which Congress explicitly relied when it amended the Act in 1978, the Back Pay Act affords relief where (1) a promotion decision is made in violation of an applicable legal provision and (2) the aggrieved employee would have received the promotion but for the violation. The decision of the majority below misreads the legislative history in several important respects.

First, the court seems to equate the term "nondiscretionary" with the word "noncompetitive," apparently concluding that only denials of noncompetitive promotions can violate nondiscretionary provisions.[32]

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[32] In so concluding, the court of appeals has failed to give due deference to the longstanding interpretation

(App. *infra*, 13a-14a). As the FPM provisions and Comptroller General decisions make clear, however, nondiscretionary provisions -- whether in collective bargaining agreements, personnel regulations, or statutes can be violated when competitive promotions are denied.[33]

Second, the court of appeals appears to suggest that only in noncompetitive situations can it be fairly said that an employee would have received a promotion but for the unlawful action. (App., *infra*, 13a). That suggestion is belied by Comptroller General opinions relying on such factual findings as a predicate to awarding retroactive relief[34] as well as by the district court's factual findings in the present cases that petitioners would have received their competitive promotions but for respondents' illegal acts. (App., *infra*, 27a-35a, 62a-63a).

Finally, the majority seems to have confused the distinction between an agency exercising its discretion not to act, and the legal limits on the exercise of its discretion

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given a statute by the agencies charged with its interpretation. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

[33] Notwithstanding the majority's view below, nothing in *Spagnola v. Stockman*, 732 F.2d 908 (Fed. Cir. 1984) is to the contrary. The court in *Spagnola* denied a retroactive promotion and back pay to the aggrieved employee there because he could not show that he would have been promoted absent the overlong detail. *Id.* at 910-11. Since Spagnola could not show that a violation of a nondiscretionary provision of law had caused him to lose a promotion, the Back Pay Act afforded him no relief. *Id.* at 911.

[34] *See* 54 Comp. Gen. 312, App., *infra*, at 75a-78a; 54 Comp. Gen. 435, App., *infra*, at 85a-88a.

once an agency does pursue a course of action. (App., *infra*, 13a-14a). According to the majority, because respondents "could have decided to eliminate, or not to create, the sought after positions," they were not required to promote appellants. *Id.* at 13a. By this reasoning, the Back Pay Act affords appellants no relief. *Id.* Yet, in focusing on the agencies' opportunities for inaction, the majority opinion ignores the fact that once an agency affirmatively exercises its discretion, it is still constrained by statutes, regulations, and administrative policies, *see In re John Cahill*, 58 Comp. Gen. 59, 61 (citing *Matter of Janice Levy*, B-190408 (December 21, 1977), at 8), including Title VII. Thus, while an agency need not offer a promotional opportunity to anyone, once it chooses to do so, Title VII, a nondiscretionary provision of law, requires that the promotion be awarded in a nondiscriminatory fashion. *See* 42 U.S.C. § 2000e-2 (1982).

In *Brown v. Marsh*, the district court determined that Mr. Brown had been denied a series of promotions beginning with the denial of selection to a GS-9 position in violation of the nondiscrimination mandate of Title VII, and that Brown would have received the promotions but for the Army's violation of this nondiscretionary provision of law. (App., *infra*, 27a-35a). Similarly, in *Mitchell v. Secretary of Commerce*, the district court concluded that Mr. Mitchell would have been promoted to a GS-13 job but for his immediate supervisor's violation of Title VII. (App., *infra*, 62a-63a). Just as the Comptroller General may authorize back pay where an arbitrator finds an employee would have received a competitive promotion but for violation of a collective bargaining agreement, a district court may award back pay under the Act based on its own findings that an employee would have received the same promotion if Title VII, the applicable statute, had not been violated.

The denials of promotion suffered by petitioners satisfy all the elements necessary to an award of back pay and

interest under the Back Pay Act. The district court, an appropriate authority, ruled that respondents failed to take an action, that is, to promote petitioners, and that this failure was unjustified under applicable law because it violated Title VII, a nondiscretionary provision of law. The court awarded retroactive promotions and back pay to petitioners because it found that, in the absence of discrimination, they would have been selected for the promotions at issue.[35] (App., *infra*, 27a-35a, 61a-63a). The Back Pay Act's requirement that "it [be] clearly established by appropriate authority that, under applicable law . . . the employee would have been selected for the promotion, *but for* the unjustified or unwarranted personnel action"[36] has been satisfied by petitioners here.

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[35] Title VII requires no less. *See, e.g., Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1122-23 & n.15 (3d Cir. 1988); *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165-66 (9th Cir. 1984); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976).

[36] (Emphasis in original) FPM Supp. 990-2, Book 550, Subch. 8, § 8-4 (1977) (citing Comptroller General decision B-180010, December 2, 1974, 54 Comp. Gen. 435; *id* B-180010, March 19, 1975).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 89-5371, 89-5375

JAMES E. BROWN,

Appellant,

v.

SECRETARY OF THE ARMY,

Appellee.

WELLINGTON MITCHELL,

Appellant,

v.

SECRETARY OF COMMERCE,

Appellee.

Argued and Submitted Sept. 25, 1990

Decided Nov. 9, 1990

Joseph M. Sellers, with whom Tracy E. Sivitz, and John R. Erickson, Washington, D.C. were on the brief, for appellant, in No. 89-5371.

Joseph M. Sellers, with whom Tracy E. Sivitz, and Barry J. Reingold, Washington, D.C. were on the brief, for appellant, in No. 89-5375.

William J. Dempster, Asst. U.S. Atty., with whom Jay B. Stephens, U.S. Atty., John D. Bates, and R. Craig Lawrence, Asst. U.S. Attys., Washington, D.C. were on the brief for appellee, in No. 89-5371 and No. 89-5375. Edith S. Marshall, Washington, D.C. also entered an appearance for appellee.

John Townsend Rich and Elizabeth Runyon Geise, Washington, D.C. were on the brief for amici curiae in support of appellants.

Appeal from the United States
District Court for the District of Columbia

Before WALD, Chief Judge, RUTH BADER GINSBURG, and SENTELLE, Circuit Judges.

RUTH BADER GINSBURG, Circuit Judge:

In these consolidated appeals, federal employees James Brown and Wellington Mitchell contest district court rulings denying prejudgment interest on the back pay awarded them as successful litigants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. On May 11, 1989, the district court awarded Brown, a black civilian employee of the United States Army, promotions retroactive to 1975 and corresponding back pay. *See Brown v. Marsh*, 713 F.Supp. 20 (D.D.C. 1989). On July 17, 1989, the same judge awarded Mitchell, a black Hispanic employee of the National Weather Service, a promotion retroactive to 1980 and attendant back pay. *See Mitchell v. Secretary of Commerce*, 715 F. Supp. 409 (D.D.C. 1989).

In both cases, the district court was prepared to accept as manifest in the Back Pay Act's interest prescription. 5

U.S.C. § 5596(b)(2), a waiver of the government's immunity from prejudgment interest that encompassed, inter alia, Title VII back pay awards. The court further observed, however, that the Back Pay Act reaches only unlawful personnel actions that have resulted in a "withdrawal or reduction" of pay. The wrongfully withheld promotions at issue, the district court concluded, did not "withdraw" or "reduce" the complainants' pay. Hence, the court held, Congress had not provided for an immunity waiver of sufficient sweep to cover prejudgment interest in Brown's and Mitchell's cases. *See Brown*, 713 F.Supp. at 25; *Mitchell*, 715 F. Supp. at 411. We agree substantially with the district court's reasoning and result and accordingly affirm its judgments in the two cases.

I.

The government principally argues in this court that successful Title VII claimants in the federal sector simply do not qualify for prejudgment interest because (1) Title VII itself does not contain the requisite sovereign immunity waiver, and (2) the Back Pay Act, 5 U.S.C. § 5596, which does contain an immunity waiver encompassing interest, does not complement Title VII relief. In accord with the district court, and for the reasons set out below, we are unpersuaded by the government's broad argument that "[t]he Back Pay Act does not apply to [Title VII] discrimination claims." *See* Brief for Appellees at 10.

It is undisputed that, under current doctrine binding the lower courts, sovereign immunity shields the federal government from prejudgment interest on damage awards absent an express statutory waiver. Title VII itself, the Supreme Court held in *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), does not provide for waiver of the government's immunity from interest awards. In *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988), however, the Court concluded that the requisite express waiver could be supplied by a separate statute. Prejudgment interest could be

awarded in a Title VII suit against the Postal Service, the Court held, based on the provision of the 1970 Postal Reorganization Act, 39 U.S.C. § 401(1), that the Postal Service may "sue and be sued." *See Loeffler*, 486 U.S. at 555-59, 108 S.Ct. at 1969-71.

The government offers no convincing reason why the Back Pay Act does not supply the immunity waiver prescription absent in Title VII, just as the Postal Reorganization Act does. Enacted in 1966, the Back Pay Act provides that a federal employee is entitled to back pay if he or she "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of [his or her] pay, allowances, or differentials." *See* 5 U.S.C. § 5596(b)(1). In 1987, the Act was amended to state that "an amount payable [under the Act] shall be payable with interest." Pub.L. No. 100-202, 101 Stat. 1329 (codified at 5 U.S.C. § 5596(b)(2).

In the cases successfully pursued by Brown and Mitchell, an "appropriate authority" (the district court) has found that the challenged personnel actions were "unjustified or unwarranted" under applicable law (Title VII). Consequently, *if* appellants meet the remaining Back Pay Act terms, sovereign immunity—as the district court thought "manifest," *Brown*, 713 F.Supp. at 25—would not appear to block the assessment of prejudgment interest on their back pay awards. *Accord Smith v. Brady*, 744 F.Supp. 925, 927-28 (N.D.Cal. 1990).

The government maintains, however, that Congress confined Title VII and the Back Pay Act to totally separate spheres. Turning first to the Back Pay Act, we find in its text no hint of an exclusion of, or exemption for, federal sector Title VII adjudications. The Act applies to any "employee of an agency" and exempts only the Tennessee Valley Authority and its employees. *See* 5

U.S.C. §§ 5596(a), (c). Relevant too are the regulations prescribed by the Office of Personnel Management (OPM) to carry out the Back Pay Act. Those regulations define an "appropriate authority" as "an entity having authority in the case at hand to correct or direct the correction of an unjustified or unwarranted personnel action," and specifically include, inter alia, the Equal Employment Opportunity Commission (EEOC). *See* 5 C.F.R. § 550.803 (1990). The regulations further provide that the Back Pay Act's requirement for a "timely appeal" is met when "[a]n employee or an employee's personal representative initiates an appeal or grievance . . ., [including] a discrimination complaint. . . ." 5 C.F.R. § 550.804(b). The references in the OPM regulations to discrimination complaints and to the EEOC, whose sole function is to enforce Title VII, strongly suggest OPM's assumption that the Back Pay Act is appropriately applied in tandem with Title VII.

The Back Pay Act was enacted six years before the protections of Title VII were extended to federal employees; the Act's legislative history is therefore uninformative on the relationship of the two measures. Nor does legislative history on the 1987 amendment to the Act, which waives sovereign immunity for interest awards, specifically address Title VII claims. If the two measures are to be held rigidly separate rather than harmonized, the instruction to do so must be ascribed to Title VII, and that is indeed the government's main theme.

The government relies on two Supreme Court decisions, *Brown v. General Services Administration*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), and *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). Those decisions, the government urges, indicate that Congress intended the remedial provisions of Title VII to provide the exclusive framework under which a federal employee may obtain relief for employment discrimination. Unlike the self-standing statutes at issue in *Brown* and *Novotny*,

however, the Back Pay Act is an auxiliary measure that leaves the structural framework of Title VII intact and fully applicable. Thus, neither decision appears to us to impede the application of the Back Pay Act to Title VII adjudications.

In *Brown v. GSA*, a government employee alleging illegal racial discrimination sued under section 717 of Title VII and under 42 U.S.C. § 1981. The suit was untimely under the explicit provisions of Title VII, but the plaintiff argued that his court complaint could nonetheless be adjudicated under section 1981. The Supreme Court held that the suit was properly dismissed because Title VII, "with its rigorous administrative exhaustion requirements and time limitations," 425 U.S. at 833, 96 S.Ct. at 1968, preempted other claims for relief and provided "the exclusive judicial remedy for claims of discrimination in federal employment." 425 U.S. at 835, 96 S.Ct. at 1969.

In *Novotny*, the complainant alleged that he was injured by a conspiracy to violate Title VII; the alleged conspiracy, he maintained, deprived him of "the equal protection of the laws, or of equal privileges and immunities under the laws" within the meaning of 42 U.S.C. § 1985(3). The Court held that the "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)." 442 U.S. at 378, 99 S.Ct. at 2352. Citing *Brown v. GSA*, the Court emphasized that "[i]f a violation of Title VII could be asserted through § 1985(3)," a complainant "could completely bypass the administrative process" and evade "the short and precise time limitations of Title VII." *Id.* at 375-76, 99 S.Ct. at 2351.

In contrast to 42 U.S.C. §§ 1981 and 1985(3), the statutes at issue in *Brown* and *Novotny*, the Back Pay Act creates no alternative cause of action that circumvents Title VII's precise time frames and detailed administrative procedures. The Act is an auxiliary measure that operates only at the relief stage. It furnishes relief only after an

"appropriate authority" finds that, under some other provision of law, a federal employee has suffered an "unjustified or unwarranted personnel action." Thus, a Title VII plaintiff may not recover anything under the Back Pay Act unless and until he or she has complied with the exacting procedural requirements of Title VII and succeeded on the merits.

Brown and *Novotny* squarely hold that a remedial framework inconsistent with the structure of Title VII is preempted by that Title. We are aware of but one such inconsistency between the remedies authorized by Title VII and those authorized by the Back Pay Act: Title VII limits recovery to back pay accruing within two years prior to the filing of the administrative charge. *See* 42 U.S.C. § 2000-5(g). The difference, however, is easily accommodated. The specific limitation of Title VII must prevail over the more generous term of the Back Pay Act.

In sum, we find scant support for the government's overarching argument that (1) the Back Pay Act does not apply at all to discrimination claims, so that (2) the Act's waiver of sovereign immunity does not authorize prejudgment interest on back pay awards to any successful Title VII claimants in the federal sector. On the contrary, our review persuades us that the two measures, Title VII and the Back Pay Act, are most sensibly read as complementary. We thus accept, as did the district court, the position that the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards, and we turn to the more difficult and ultimately dispositive question: Does Back Pay Act coverage encompass unlawfully discriminatory promotion denials of the kind involved in appellants' cases?

II.

As we just observed, our conclusion that the Back Pay Act applies to back pay awards under Title VII does not

resolve these appeals. The Back Pay Act has its own requirements that must be satisfied before a plaintiff may recover back pay. Specifically, a federal employee seeking to recover under the Act must be found "to have been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of [his or her compensation].*" 5 U.S.C. § 5596(b)(1) (emphasis added).

In the decision that marks our path, *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d (1976), the Supreme Court held that Back Pay Act relief is available only to compensate for a reduction in pay or a decrease in grade. The Court said: "[T]he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." *Id.* at 407, 96 S.Ct. at 957.

The complainants in *Testan* sought reclassification of their positions to a higher grade, but the Court's rationale is not confined to that category of upgrade. Under the *Testan* Court's reading of the Back Pay Act, retrospective recovery simply was not provided for the employee who "had been denied a promotion on improper grounds," and so claimed that "he should have been placed in a higher grade." *Id.* at 406, 96 S.Ct. at 957. In holding that *Testan* precludes application of the Back Pay Act to afford compensation to appellants for the promotions wrongfully denied them, the district court aligned itself with other lower courts. *See, e.g., Donovan v. United States*, 580, F.2d 1203, 1207-08 (3d Cir. 1978); *Hearn v. Turnage*, 739 F.Supp. 1312, 1313 (E.D.Wis. 1990); *Predmore v. Allen*, 407 F.Supp. 1067, 1072-74 (D.Md. 1976); *cf. Lee v. Brady*, 741 F.Supp. 990, 991 & n.1 (D.D.C. 1990) (awarding

prejudgment interest for an unlawful termination and specifically distinguishing unlawful failures to promote).[1]

Appellants rely most heavily on a statutory change that postdated *Testan*: The Civil Service Reform Act of 1978 amended the Back Pay Act to include within the definition of covered "personnel action[s]," "the omission or failure to take an action or confer a benefit." Pub.L. No. 95-454, § 702, 92 Stat. 1111, 1216 (1978) (codified at 5 U.S.C. § 5596(b)(4)). But the 1978 amendment must be read in the context of the Act as a whole. The amendment's clarification of the term "personnel action" to include "failure . . . to confer a benefit" left untouched the condition that the employee suffer a "withdrawal" of or "reduction" in compensation.

Federal sovereign immunity is an area in which lower courts have been admonished to construe waivers tightly, despite doubts sparked by contemporary conditions and equitable considerations. *See Library of Congress v. Shaw*, 478 U.S. at 318, 106 S.Ct. at 2963; *Shaw v. Library of Congress*, 747 F.2d 1469, 1487 (D.C.Cir. 1984) (dissenting opinion). In view of that instruction, we must resist the argument that any unlawful failure to promote involves the "withdrawal or reduction" of compensation because the employee wrongfully denied promotion does not receive money that he or she otherwise would have.

In recognition of *Testan*, Congress, in 1978, specifically exempted reclassification actions from the Back Pay Act's scope. *See* S.Rep. No. 969, 95th Cong., 2d Sess. 115 (1978), *reprinted in* 1978 U.S.CODE CONG. &

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[1] The court in the instant cases noted its disagreement with the decisions in *Parker v. Burnley*, 693 F.Supp. 1138 (N.D.Ga.1988), and *Rollins v. Bennett*, 48 Fair Empl.Prac.Cas. (BNA) 1172 (W.D.Wash.1988). *See Brown*, 713 F.Supp. at 225 n. 13; *Mitchell*, 715 F.Supp. at 412 n. 6.

ADMIN.NEWS 2723, 2837. But Congress said no more. We cannot speculate that, by codifying *Testan* in relation to "any reclassification action," 5 U.S.C. § 5596(b)(3),[2] Congress simultaneously, albeit silently, rendered inoperative or meaningless the "withdrawal or reduction" language upon which the *Testan* opinion rested.

While we cannot ignore the language Congress left untouched, we also cannot ignore the words Congress inserted, *i.e.*, the amplified definition of "personnel action" to include the "failure . . . to confer a benefit." The legislative history, we conclude, affords a basis for reconciliation; it shows that Congress intended the 1978 amendment to cover unlawful failures to promote of a certain, precisely limited, kind. As the Senate Report states, the amendment was intended "to reflect the broader interpretation of the statute that has been given the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulations." S.Rep. No. 969, at 114. This "broader interpretation," Comptroller General and Civil Service Commission statements reveal, encompasses noncompetitive, mandatory promotions, not the competitive promotions at issue here.

The Comptroller General's policy at the time of the 1978 legislative adjustment recognized that

> while employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement or by promulgation

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[2] We assume Congress, by citing *Testan* to exclude "reclassification actions" from the Back Pay Act, intended to exempt those actions in which government employees claim that their classification should be upgraded because their duties are the same as other government employees in a higher grade. *See* Classification Act, 5 U.S.C. § 5101 *et seq.*

> of a regulation, may limit its discretion so that under specified conditions it becomes mandatory to make a promotion on an ascertainable date. . . .
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> . . . .
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> . . . .The violation of such a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act. . . .

In re John Cahill, 58 Comp. Gen. 59, 61-62 (1978).

Regulations promulgated by the Civil Service Commission at the time of the Civil Service Reform Act of 1978 similarly focused on the noncompetitive aspect of certain promotions. These regulations defined an "unjustified or unwarranted personnel action" to include an act of

> omission . . . which it is subsequently determined violated or improperly applied the requirements of *a nondiscretionary provision, as defined herein*, and thereby resulted in the withdrawal, reduction, or denial of all or any part of the pay, allowances, or differentials, . . . otherwise due an employee.

5 C.F.R. § 550.802(1977) (emphasis added).

"Nondiscretionary provision," according to these regulations, means

> any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that *requires an agency* to take a prescribed action under stated conditions or criteria.

Id. (emphasis added).

Reviewing the amendment's legislative history and the policies in effect at the time of its enactment, the Federal Circuit concluded:

> [T]he 1978 amendment was *not* designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were *required* by law (a statute or regulation). The history of the change emphasizes this limited purpose. Previously, the Back Pay Act literally permitted recovery only when the employee incurred "a withdrawal or reduction in pay," thus omitting in words to blanket failures to make *additional* payments that were mandated by law, *e.g.*, a statutory periodic increase or a benefit conferred by a non-discretionary administrative regulation. For some years, the General Accounting Office authorized such payment for non-discretionary benefits, and in 1977 the Civil Service Commission adopted regulations along the same line. The 1978 amendment to the Back Pay Act was specifically intended to incorporate that general administrative position into the Act—and no more.

Spagnola v. Stockman, 732 F.2d 908, 912 (Fed.Cir. 1984) (Davis, J.) (emphasis in original) (citations omitted). *Spagnola* involved an employee temporarily detailed, long beyond the unlawful period, to higher-level work, but paid throughout the period at his lower-grade rate. The Federal Circuit's reasoning, however, fully fits this case.

Guided by *Spagnola*,[3] we comprehend the 1978 Back

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[3] The Federal Circuit in *Spagnola*, faithful to the circumscribed interpretations of the Comptroller General and the Civil Service Commission, declined to sweep into the "nondiscretionary" category *all* unlawful personnel actions, the giant step our dissenting colleague's position obliges her to take.

Pay Act definitional amendment to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief. Only in the former case will the employee be treated as one already "duly appointed" to the higher position, so that the failure to confer the benefit constitutes a "withdrawal or reduction" in compensation.[4]

Appellants seek to fit their cases within the "nondiscretionary" or mandatory upgrade category by urging that, absent unlawful discrimination, they would have been selected for advancement, hence they "had a right to the promotions at the time they were denied them." *See* Brief for Appellants at 23. Appellants did not, however, have a right to the promotions *before* they were denied them. The agencies, in their discretion, could have decided to eliminate, or not to create, the sought-after positions. We do not read the repeated use of the words "mandatory," "nondiscretionary," and "require[d]" in the legislative history and background regulations to "merely indicat[e]" that the Back Pay Act affords no remedy for lawful action. *But see* dissent at 223. Instead, we read those words to mean that the

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[4] Our conclusion that the 1978 amendment to the Back Pay Act covers some but not all promotions is consistent with the comment in the Senate Report that the amended Act would extend to any employee who is found to have suffered a "withdrawal, reduction, denial or denial of an increase in" compensation as a result of an unjustified or unwarranted personnel action. That comment is followed up by the qualification that, in referring to personnel action that is "unjustified or unwarranted," the legislators meant "acts of commission as well as omission with respect to *nondiscretionary* provision of law, Executive order, regulation, or collective bargaining agreement." S.REP. No. 969, at 115 (emphasis added).

agency never had any choice but to take the particular, precisely defined action in question.

In sum, the Back Pay Act, as currently framed, contains clauses tugging in opposite directions. We have adopted a reading that, if less than fully satisfying, is consistent with the Supreme Court's instruction that federal sovereign immunity waivers must be unambiguously expressed, and construed strictly in favor of the sovereign. *See Library of Congress v. Shaw*, 478 U.S. at 318, 106 S.Ct. at 2963. Our reading follows a path between two impassable obstacles: ignoring the 1978 amendment because no "failure . . . to confer a benefit" will ever satisfy the "withdrawal or reduction" requirement; or ignoring the original, unrepealed mandate that there be a "withdrawal or reduction" in compensation.

Conclusion

For the reasons stated, the judgments of the district court denying interest on the back pay awarded to appellants as a remedy for Title VII violations are

Affirmed.

WALD, Chief Judge, dissenting as to Part II:

I agree with the panel that the Back Pay Act, 5 U.S.C. § 5596, applies to actions by federal employees under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and thus waives, to the extent of its coverage, the federal government's sovereign immunity from prejudgment interest on awards of back pay resulting from successful Title VII actions. Consistent with the *ratio decidendi* of that conclusion, however, I dissent from the panel's holding that the Back Pay Act does not encompass denials of promotions that were held to be unlawful under Title VII.

As part of the Civil Service Reform Act of 1978, Congress amended the Back Pay Act to expand the definition of "unjustified or unwarranted personnel action[s]" covered by the Act to include "the omission or failure to take an action or confer a benefit." Pub.L. No. 95-454, § 702, 92 Stat. 1111, 1216 (1978) (codified at 5 U.S.C. § 5596(b)(4)). An unlawful failure to promote an individual is a quintessential example of an "unwarranted personnel action" committed by failing to "take an action" or to "confer a benefit." Moreover, the legislative history indicates that the amendment was meant "to reflect the broader interpretation . . . given [to] the Back Pay Act in recent years by the Comptroller General and the Civil Service Commission through decision and regulation." S.Rep. No. 969. 95th Cong., 2d Sess. 114 (1978), *reprinted in* 1978 U.S.CODE CONG. & AD.NEWS 2723, 2836. As the panel notes, these agencies had interpreted the Back Pay Act to apply to at least certain categories of promotions. *See, e.g., In re John Cahill*, 58 Comp. Gen. 59, 61-62 (1978) (extending Act to "mandatory" promotions required by collective bargaining agreements); 5 C.F.R. § 550.802 (1978) (applying Act to "nondiscretionary" promotions).

The unqualified language added by the 1978 amendment, extending the Back Pay Act to cover the "failure to take an action or confer a benefit," presumptively applies to all categories of actions covered by the Act, including—as the panel has decided—those under Title VII, absent strong evidence indicating that Congress intended to give the language less than its plain meaning. The panel, however, concludes that the 1978 amendment extended the Act only to promotions of a very limited kind rarely if ever at issue in Title VII promotions cases. Majority Opinion ("Maj. op.") at 219-221. I am unpersuaded.

The panel is uncomfortable, as was the district court, with the fact that Congress in 1978 left unchanged the Back Pay Act's requirement that an aggrieved employee

suffer a "withdrawal or reduction" in pay. 5 U.S.C. § 5596(b)(1). Because the wrongful denial of a promotion results in neither a "withdrawal" nor a reduction" in an employee's existing pay, but merely deprives the employee of an increase in that pay, the panel concludes that this language is in tension with Congress' extension of the Act to "omission[s] or failure[s] to take an action or confer a benefit." Maj. op. at 218-219. The legislative history of the amendment, however, provides a satisfactory explanation that reinforces the plain language of the amendment itself. The Senate Report, after stating that the amendment reflects the "broader interpretation" given to the Act by the Civil Service Commission and the Comptroller General, indicates that Congress intended the words "withdrawal or reduction" to be read more expansively in the future to cover "a withdrawal, reduction, *denial, or denial of an increase in*" all or part of an employee's compensation. S.Rep. No. 969 at 115, *reprinted in* 1978 U.S.CODE CONG. & AD.NEWS at 2837 (emphasis added). This indication of an intent to adopt a more expansive construction of an old term to accommodate a new one resolves the tension and emphasizes the amendment's extension of the Act to unlawful denials of promotions and other acts of omission or failures to confer benefits.[1]

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[1] In *Spagnola v. Stockman*, 732 F.2d 908, 912 (Fed.Cir. 1984), the Federal Circuit construed this piece of the legislative history to indicate that Congress intended to expand the words "withdrawal or reduction" to cover only those types of promotions recognized by the Comptroller General and the Civil Service Commission, and no more. The court stated:

> Previously, the Back Pay Act literally permitted recovery only when the employee incurred 'a withdrawal or reduction' in pay, 5 U.S.C. § 5596(b) (1976)—thus omitting in words to blanket failures to make *additional* payments that were mandated by

In any event, the panel refuses in at least some cases to allow the "withdrawal of reduction" language to trump Congress' clear intent to expand the Back Pay Act to promotions.[2] Relying on the broader interpretation that

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> law, *e.g.*, a statutory periodic increase or a benefit conferred by a non-discretionary administrative regulation. For some years, the General Accounting Office authorized such payment for non-discretionary benefits . . . and in 1977 the Civil Service Commission adopted regulations along the same line. . . . The 1978 amendment . . . was specifically intended to incorporate that general administrative position into the Act—and no more.
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> *Id.* (citing to Senate Report). As explained below, however, I believe this language in *Spagnola* is fully consistent with construing the 1978 amendment to cover the types of promotions at issue in the typical Title VII promotions actions.

[2] To this extent, the, the panel accepts that the 1978 amendment limited the Supreme Court's decision in *United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). In *Testan*, the plaintiffs sought the reclassification of their positions to a higher grade and claimed a corresponding right to back pay for the period when they were preforming the work required of those in the higher grade. The Court denied them relief, holding that the Back Pay Act applies only where there is an actual "withdrawal or reduction" in an employee's existing pay. *Id.* at 406-07, 96 S.Ct. at 957. The legislative history of he 1978 amendment recognized and confirmed the *Testan* decision, but expressly limited it to reclassification actions. *See* S.Rep. No. 969 at 114, *reprinted* in 1978 U.S.CODE CONG. & AD.NEWS at 2836 (the amendment

had theretofore been given to the Back Pay Act by the Comptroller General and the Civil Service Commission, the panel concludes that Congress intended back pay to extend only to those promotions that are "mandatory" or "nondiscretionary" so that the aggrieved employee may "be treated as one already 'duly appointed' to the higher position" and the failure to promote as the equivalent of a "withdrawal or reduction" in pay. Maj. op. at 220. The panel reads this standard as applying only where an agency is required to take a specified action. *Id.* at 220. The problem with this analysis, however, is that promotions denied for discriminatory reasons in violation of Title VII also meet this test. Title VII is an instruction to employers not to permit discrimination to infect their employment decisions, and the finding required in order to hold an employer liable for back pay in a Title VII promotions case—that an employee would have been promoted absent illegal discrimination[3]—falls squarely

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"reflects the 1976 decision of the Supreme Court in *United States v. Testan* by explicitly exempting reclassification actions from its provisions").

[3] Prior to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the circuits were split over precisely what the plaintiff in a Title VII disparate treatment case had to prove in order to establish liability on the part of the employer. Some circuits required the plaintiff to prove that the decision would have been in her favor but for the discrimination, *see, e.g., Peters v. City of Shreveport*, 818 F.2d 1148, 1161 (5th Cir.1987); other circuits, including this one, held that once a plaintiff had shown that discrimination contributed to the employment decision, the burden shifted to the employer to show that the same decision would have been made absent consideration of the impermissible factor, *see, e.g., Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir.1983); and still

within the Civil Service Commission's definition of a "nondiscretionary" action. That definition encompassed

> any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that requires an agency to take a prescribed action under stated conditions or criteria.

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other circuits distinguished the question of liability from that of remedies, holding that a Title VII violation was made out upon plaintiff's showing that discrimination was a factor in the decision, but that equitable remedies such as back pay and promotions would not be granted if the employer could demonstrate that the same decision would have been made absent the discrimination. *See, e.g. Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1165-66 (9th Cir. 1984). All circuits, however, were united in refusing to impose equitable remedies absent a showing—either by direct proof or by the employer's failure to rebut a presumption in favor of plaintiff—that plaintiff would have received the position but for discrimination by the employer.

The Supreme Court's decision in *Price Waterhouse* resolved this intercircuit conflict by holding that a Title VII plaintiff must show only that discrimination was a factor in an adverse employment decision, but that the employer can avoid a finding of liability, along with remedies such as back pay and promotions, by demonstrating that its decision would have been the same absent consideration of the illicit factor. *See* 109 S.Ct. at 1784-93 (plurality opinion). Thus, after *Price Waterhouse*, the remedies question remains the same as before: whether, absent the discrimination, the person would have received the position.

5 C.F.R. § 550.802 (1978). Title VII, a "provision of law," "requires" a federal employer to "take a prescribed action under stated . . . criteria," namely, to promote an employee is not doing so would violate Title VII's bar on discrimination.

If a failure to promote is illegal under substantive law, then, a federal employer has no discretion and must promote the employee. I read the Civil Service Commission's use of the word "nondiscretionary," and Congress' adoption of it in the legislative history of the 1978 amendment, as merely indicating that the Back Pay Act is not intended to apply to *any* employment act that is legal because entrusted to the discretion of the federal employer. This is borne out by the language in the legislative history quoted by the panel. Maj. op. at 220 n. 4, indicating that "unjustified or unwarranted" personnel actions are "acts of *commission as well as omission* with respect to nondiscretionary provision[s] of law, Executive order, regulation or collective bargaining agreement." S.Rep. No. 969 at 115, *reprinted in* 1978 U.S.CODE CONG. & AD.NEWS at 2837 (emphasis added). This, of course, is fully consistent with the fact that the Back Pay Act itself provides no substantive rights, but merely provides a remedy—back pay—where a federal employee is found to have suffered an "unjustified or unwarranted personnel action" by "an appropriate authority" under "applicable law, rule, regulation, or collective bargaining agreement." 5 U.S.C. § 5596(b)(1).

The absence of any pre-1978 application of the "nondiscretionary" standard to discriminatory promotions actions by the Civil Service Commission or the Comptroller General can also be easily explained: The three major pieces of federal discrimination legislation that applied to federal employees prior to 1978—Title VII, the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206—all provided for their own back pay remedies. Because the Back Pay Act at that time did not waive the government's immunity

from prejudgment interest, there was not need for a federal employee suing under one of these statutes to resort the Back Pay Act for relief, and thus there was nothing compelling the federal agencies that administered the Back Pay Act to address the question presented here—whether the Back Pay Act applies to wrongful denials of promotions under these statutes. That historic circumstance should not, however, detract from the plain text of the 1978 amendment itself, which broadened the Back Pay Act's coverage to failures to take actions or confer benefits.

Finally, the panel demurs on the ground that *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), instructs us to find waivers of the government's sovereign immunity from interest only where Congress has clearly expressed such an intent. Once the panel has determined, however, that Congress waived the government's immunity in the Back Pay Act with respect to Title VII actions, that waiver should be given its full and natural effect unless there are indications that Congress intended otherwise. This accords with the Supreme Court's approach in *Loeffler v. Frank*, 486 U.S. 549, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988), where the Court held that Congress had waived the government's immunity from interest in Title VII actions against the United States Postal Service by providing in the Postal Reorganization Act of 1970, 39 U.S.C. § 401(1), that the Postal Service could "sue and be sued." The Court stated that such waivers of government immunity "should be liberally construed" absent indications that Congress intended the waiver to be interpreted narrowly and absent any inconsistency with a broader statutory policy or scheme.[4] *Id.* at 554-57, 108 S.Ct. at 1968-70. For the

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[4] Although the Supreme Court in *Loeffler* applied this "liberal construction" rule only in the context of a "sue and be sued" clause in a federal agency's enabling legisla-

reasons given above, I find no indication that Congress intended its 1978 amendment of the Back Pay Act to have any less comprehensive effect that its language naturally suggests -- extending the scope of the Act to all cases involving an "unjustified or unwarranted" denial of promotion under applicable law, regulation, or collective bargaining agreement, including discriminatory denials of promotions under Title VII. Moreover, a liberal construction of the waiver of immunity accomplished by the Back Pay Act would be fully consistent with the Act's general policy of providing federal employees with a remedy for compensation lost due to "unjustified or unwarranted personnel action[s]." I therefore respectfully dissent from the panel's holding that denials of promotions held unlawful under Title VII are not encompassed by the Back Pay Act.

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tion, there is no reason it should not be applied more generally to cover waivers of the type at issue in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. CIV. 80-1169 (CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, Secretary of the Army,

Defendant.

ORDER

[Filed July 17, 1989]

The plaintiff Brown has moved for reconsideration of the Court's Opinion and Order of May 11, 1989. Specifically, Brown asks that the Court reconsider that portion of its decision which denied Brown's request for interest on the award of back pay under Title VII. The Court, after full consideration of the parties' submissions, has determined to deny Brown's motion.

For the most part, Brown has simply amplified the analysis underlying his contention that a failure to promote does, in fact, constitute a "withdrawal or reduction" of an employee's compensation. This argument, however, does not arise from the 1978 amendments to the Back Pay Act. It existed prior to those amendments, and,

were it of some validity, would seem likely to have been reflected in such decisions as *United States v. Testan*, 424 U.S. 392, 406 (1976), *Donovan v. United States*, 580 F.2d 1203, 1207-08 (3d Cir. 1978), and *Predmore v. Allen*, 407 F. Supp. 1067, 1072-74 (D. Md. 1976). These cases reject Brown's argument, however, and the 1978 amendments to the Back Pay Act do nothing to undermine the rationale of these cases.

Accordingly, it is, by the Court, this 17th day of July, 1989,

ORDERED, that the plaintiff Brown's motion for reconsideration of this Court's Opinion and Order of May 11, 1989, shall be, and hereby is, denied.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. 80-1169 (CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH,
SECRETARY OF THE ARMY,

Defendant.

[Decided May 11, 1989]

Joseph M. Sellers, Washington Lawyers' Committee for Civil Rights Under Law, John R. Erickson, Reed Smith Shaw & McClay, Washington, D.C., for plaintiff.

William J. Dempster, Assistant U.S. Attorney, with whom Jay Stephens, U.S. Attorney, and John D. Bates, Assistant U.S. Attorney, were on the briefs, for defendant.

CHARLES R. RICHEY, District Judge.

On May 12, 1988, the Court granted partial summary judgment in the plaintiff Brown's favor on the issue of liability in this Title VII action. The Court found that the defendant (the "Army") had failed to respond in a timely fashion to a proposed disposition of Brown's case

prepared by the EEOC. The EEOC's proposed disposition included a finding that the Army had discriminated against Brown on the basis of his race, which is black. Accordingly, and in compliance with the terms of a Memorandum of Understanding that had been executed between the Army and the EEOC, the Court found that the Army's delinquent response effectively constituted an "adoption" of the EEOC's finding of discrimination.

The Court's decision to enforce the EEOC's finding on the issue of liability, however, left unresolved the details of a rather large aspect of the case -- the remedy to which Brown is entitled. The Court, trusting in the reasonableness of the plaintiff and the fairness of the Army, had hoped that the parties would be able to resolve the issue among themselves. The passage of time, however, coupled with the venting of much spleen, ultimately convinced the Court that its trust was misplaced. Accordingly, the Court directed the parties to submit detailed statements of the relief to which Brown may be entitled, and obtained the parties' permission to decide the issue on the basis of these submissions.[1] The Court has reviewed the parties'

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[1] This somewhat abbreviated procedure, accepted by all parties, perhaps reflects a yearning by the participants' to see this litigation end sometime before the Millennium. As Judge Mikva noted in 1985, in reversing this Court's dismissal of Brown's complaint, "this dispute has gone on far too long and has burdened the time and resources of more different courts and judges than was reasonably necessary," and that "it is long past time for this matter to be resolved." *Brown v. Marsh*, 777 F.2d 8, 11 (D.C. Cir. 1985). The Court fervently hopes that this will be the last chapter in this multi-volume treatise of intransigence, bullheadedness and irresponsible litigation tactics from both parties. Note, however, that the Court excepts plaintiff's current counsel from this latter reference.

papers, and describes herein the relief which Brown shall obtain.[2]

A. *Brown's Career Path*

The Court's grant of partial summary judgment dealt with the Army's refusal to hire Brown to a GS-9 position in 1976. The Court's judgment adopted the EEOC's conclusion that, in failing to obtain the position, Brown was the object of race-based discrimination. The Court further adopted the EEOC's suggestion that Brown be promoted to a GS-9 position retroactive to August 21, 1975, and that he receive back pay, including all within-grade increases, pay adjustments, and any promotions that may have accrued by way of restructuring or reclassification of the job that Brown was denied.[3]

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[2] This opinion addresses only the types of relief as to which there is a dispute. The parties have agreed to certain forms of relief, and the Order issued in connection with this Opinion will reflect those areas of agreement.

[3] The pertinent portion of the Court's Order of May 12, 1988, reads as follows:

> FURTHER ORDERED, that judgment shall be entered in favor of the plaintiff to the extent required by the Court's adoption of the EEOC decision in the Report of Supplemental Investigation, specifically
>
> -judgment shall be entered in favor of the plaintiff on his claim of discrimination by reason of reprisal, and
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> -judgment shall be entered granting plaintiff a promotion to a GS-9 position similar to the position denied him, and such promotion shall be retroactive to August 21, 1975, and
>
> -judgment shall be entered awarding plaintiff backpay, including all within-grade increases, pay

The language of the EEOC report, as tracked by this Court in its order of partial summary judgment, appears to limit Brown's retroactive relief to such improvements as may have occurred in the *particular* GS-9 position for which Brown applied. In other words, the language seems to suggest that Brown's relief should be structured solely according to the evolution of the *position* which Brown was improperly denied. The Army's arguments reflect this reading; the Army contends that Brown's retroactive relief should be calculated at a GS-9 level only.

Brown wants more. He bases his request for relief on the subsequent career path of the individual (Charles Scheuddig) actually chosen for the GS-9 position, although Brown asks the Court to ignore several career setbacks experienced by Scheuddig which, according to Brown, he would not have suffered. Brown's approach would mirror precisely Scheuddig's progress from 1975 to 1982, during which time Scheuddig moved from a GS-9 to a GM-13. From 1982 to the present, however, for various reasons which Brown suggests would not apply to him, Scheuddig moved between GM-13 and GS-12. Scheuddig is presently a GS-12. Brown asks the Court to ignore Scheuddig's instability from 1982 to the present, and to (1) compensate Brown as a GM-13 consistently during this period, and (2) install him in a position compensated at the GM-13 level.

After reviewing the evidence, the Court is convinced that compensation pursuant to Brown's "career path" theory is required to make him "whole." In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Supreme Court articulated Title

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adjustments and any promotions that may have accrued by way of restructuring or reclassification of that type of job.

VII's remedial objective as being "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418, 95 S.Ct. at 2372. Accordingly, a district court which endeavors to fashion a remedy for discrimination cannot confine itself to narrow or technical measures which, while perhaps bearing a logical connection to the plaintiff's complaint, fail to reflect the whole of the plaintiff's injury. Rather, comprehensiveness, and a keen sensitivity to the equities of the case before it, must control the court's determination.

The record in this case suggests that Brown was an eminently competent employee, and perhaps an exceptional one.[4] His personnel reviews during the

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[4] Notwithstanding this point, however, the Court eschews any suggestion that it condones the irresponsible manner in which Brown has employed the courts in his battle against discrimination. As the Court of Appeals for the Federal Circuit put it--five years ago--in addressing another component of Brown's litigational phalanx:

> By using the approach of multiple claims and charges and citing almost every conceivable source of federal remedy under the statutes and the Constitution, appellant has succeeded in getting 17 decisions on his complaints, 12 of them now in published orders or opinions. His arguments have been flagrantly redundant if not frivolous, and they smack of harassment. He has required the attention of 16 federal judges on 30 occasions. Some judges have sat on more than one of his cases since part of his litigation technique has been piecemeal litigation. It is impossible to escape the conclusion that the judicial process has been badly abused by appellant Brown.

Brown v. United States, 741 F.2d 1374, 1377 (Fed.Cir.1984). However, the fact that Brown may

pertinent period consistently sing Brown's praises; his analytical and organizational skills are noted and extolled at every turn. Logic and the record thus compel the conclusion that Brown--absent the Army's discriminatory action and the career hurdles erected by the pendency of this litigation--would have progressed well beyond the GS-9 level. To restrict his remedy to GS-9, as the Army requests, would therefore be to engage in precisely the type of cramped remedial architecture that *Albemarle* and Title VII generally abhor. A remedial decree which considers career progress improperly denied is well within this Court's discretion under Title VII. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 399, 102 S.Ct. 1127, 1135-36, 71 L.Ed.2d 234 (1982); *Franks v. Bowman Transport Co., Inc.*, 424 U.S. 747, 762, 96 S.Ct. 1251, 1263, 47 L.Ed.2d 444 (1976).

The obvious benchmark for evaluating Brown's thwarted progress is the career path of the man promoted in his stead--Charles Scheuddig. With this said, of course, the Court immediately concedes the analytical imprecision of such an approach. In the real world, even had Brown been awarded the GS-9 position by totally objective decisionmakers, it is conceivable that he could have been killed by a bus on his way to celebrate his new job. The point is simple: there is no way of assuring with certainty that, absent discrimination, Brown's career would have ascended in the same way as Scheuddig's. The use of Scheuddig's career as a proxy for Brown's should not be taken as a finding that Brown's employment history, as a factual matter, would have mirrored Scheuddig's. The Court merely adopts this methodology because the Army's alternative--compensation at a GS-9 level--seems clearly

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be an irresponsibly inveterate litigator does not diminish his entitlement to a remedy in this action.

inequitable, and because there appears to be no more precise way of providing Brown full compensation.[5]

Using Scheuddig's career path as a guide, Brown is clearly entitled to the difference between what he earned and what Scheuddig earned during the period from August 21, 1975 (the date of the improper denial) and June 8, 1982.[6] The latter date, however, presents the first problem. On May 23, 1982, Scheuddig was appointed to a temporary position as a Housing Project Manager, which was compensated at a GM-13 level.[7] The position was set to be filled permanently on or about June 8, 1982.

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[5] To the extent the imprecision in the Court's methodology overcompensates Brown, the deterrence objectives of Title VII's remedy provision may excuse this result. *See Albemarle*, 422 U.S. at 417-18, 95 S.Ct. at 2371-72. *See also Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965) (a court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past *as well as bar like discrimination in the future*") (emphasis added).

[6] The calculation of Brown's entitlement during the entire period for which relief is sought should include all "step increases" he would have received, beginning April 14, 1976. This entitlement differs from the compensation Mr. Scheuddig actually received because Mr. Scheuddig was recruited from outside the Army, and was therefore not entitled to step increases, which accrue only to employees holding "career status." Had Brown been chosen for the position from within the Army, he would have obtained career status on April 14, 1976, and would accordingly have been entitled to appropriate step increases commencing on that date.

[7] Scheuddig was a GS-12 at the time.

Scheuddig was entitled to apply for the permanent position, but, for reasons that are unclear, chose not to do so.[8] As a result, once a permanent employee was chosen, the Army downgraded Scheuddig to another GS-12 position. Brown, however, contends that he would have applied for and been chosen to fill the permanent position as Housing Project Manager, and that his remedial career path should depart from Scheuddig's in this respect.

On its face, Brown's claim seems to suffer from an excess of self-confidence. Yet, when the record is considered, Brown's claim becomes more reasonable; indeed, it becomes quite persuasive. The record proves nothing if not Brown's ambition. Brown consistently applied for advanced positions during the years in question; he was an aggressive employee whose immediate goal at all times seems to have been self-advancement. It would ignore Brown's nature, as revealed in the record, to conclude that he would not have applied for the permanent position as Housing Project Manager when it became available in June of 1982.

The record also indicates a likelihood that he would have been chosen for the permanent position. As noted above, Brown was a stellar employee. His performance evaluations are replete with glowing commendations. At least two of his supervisors, in materials prepared in connection with this litigation, have indicated that Brown would have been chosen for promotion to other (concededly less senior) positions had certain restrictions, related to this litigation not been in place.[9] While the foregoing

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[8] The Army suggests that Scheuddig did not regard himself as qualified for the position. Defendant's Response to the Court's Order for an Evaluation of Relief Available to Plaintiff at 3.

[9] *See* Affidavit of Thomas E. Wilwerth (exhibit 11 to

cannot establish Brown's entitlement to the permanent position with ontological certainty, they do prove to the Court's satisfaction that equity requires that Brown's "remedial bundle" include compensation reflecting a successful application for the permanent position.[10]

The next question is whether events which effected [sic] Scheuddig in 1986 and 1987 should be attributed to Brown. In 1984, Scheuddig was again promoted from his GM-12 position to the position of Housing Project Manager, at GM-13. After serving in this capacity for two years, Scheuddig was involuntarily reassigned to the position of Supervisory Housing Management Specialist, also at GM-13, on June 26, 1986. The record indicates that Scheuddig's reassignment--from one GM-13 level position to another--occurred as a result of an error by the Civilian Personal [sic] Office. A year later, after the error was discovered, another individual was hired to fill the GM-13 position to which Scheuddig had been mistakenly reassigned, and Scheuddig was once again downgraded (apparently voluntarily) to a GS-12 position. Brown

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plaintiff's materials); Letter to Joseph Sellers from Timothy J. Cochis, dated June 15, 1988 (exhibit 12 to plaintiff's materials).

[10] It is also worth noting that the Army's contention--that the person actually chosen for the permanent position was more qualified than Brown--lacks support in the record. It appears that the Army failed to maintain any documents relating to the application process or the person chosen as the permanent Housing Project Manager. Under these circumstances, it is appropriate to draw inferences adverse to the party responsible for any evidentiary gaps in the record. *See Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1205-06 (8th Cir.1982); *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D.Cal.1987).

contends that, unlike Scheuddig, he would have stood his ground; he argues that he would have forced the Army to retain him in a GM-13 position. Accordingly, Brown asks that his remedy not reflect Scheuddig's reassignment to GS-12; he asks that his compensation for the pertinent period be set continuously at GM-13, and that he be placed at a GM-13 position by way of a prospective remedy.

The Court agrees with Brown. Although the Court lacks Brown's confidence in his ability to influence a recalcitrant bureaucracy, the Court is also of the opinion that it would be unfair to saddle Brown with the Army's error. Moreover, it would be unfair to limit Brown's remedy because of Scheuddig's voluntary acceptance of a downgrade to GS-12. It seems unlikely that an employee of Brown's aggressiveness would voluntarily accept any downgrade, particularly one necessitated by the Army's error. While it may be unlikely that Brown's opposition alone would have convinced the Army of the error of its ways, the fact of his likely opposition, coupled with the unfairness of including the Army's mistake in the formulation of his remedy, suggest that Brown's career path should diverge from Scheuddig's in this respect.

The sum of the foregoing is as follows. To account for the position he was improperly denied, Brown's compensation shall reflect a promotion to GS-9, effective August 21, 1975. From that date on, his career path shall track Scheuddig's, with the exceptions noted above. Brown shall be compensated as if he had been promoted to GS-11, effective October 1. 1978, and as if he had been promoted to GS-12, effective June 7, 1981. He shall be compensated as if he had been promoted to GM-13 on May 23, 1982, and as if he had been compensated at that level ever since. Brown's compensation shall take the form of back pay: he shall be entitled to such income as

he would have received absent the discrimination, less any income actually earned during this period.[11]

B. *Prejudgment Interest On the Back Pay Award*

Brown seeks prejudgment interest on the back pay to be awarded under the preceding section. The Army contests his entitlement to such interest, citing *Loeffler v. Frank*, ___ U.S. ___, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988), and *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). Broadly put, these cases represent the principle that, absent an express statutory waiver, sovereign immunity protects the federal government from liability for prejudgment interest on damage awards. *See also United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947) ("The consent necessary to waive the traditional immunity [against interest] must be express, and it must be strictly construed."). Both *Frank* and *Shaw* also recognize that Title VII does not itself contain an express consent to the assessment of prejudgment interest against the federal government.

Brown claims that the Back Pay Act, 5 U.S.C. § 5596, constitutes Congress' express waiver of sovereign immunity in this context. That statute grants federal employees the right to receive back pay when they have been affected by "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee." *Id.* at § 5596(b)(1). The Back Pay Act defines a "personnel action" to include "the omission or failure to take an action or confer a benefit." *Id.* at § 5596(b)(4). If an employee is entitled to an award under the statute,

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[11] Brown agrees that the Army shall calculate the amount of back pay, and that he will accept the Army's figures so long as they are adequately documented.

§ 5596(b)(2)(A) provides that the award of back pay "shall be payable with interest."

It is manifestly apparent that Congress intended the Back Pay Act to waive the sovereign immunity that would otherwise preclude (1) the award of back pay as to certain "personnel actions," and (2) the assessment of prejudgment interest on such an award. It is less clear, however, that Congress intended that the failure to grant a promotion -- even if wrongful -- would invoke the protections of the Back Pay Act. Certainly, prior to the amendments wrought by the Civil Service Reform Act of 1978 (the "CSRA"), courts construed the Back Pay Act to exclude wrongful failures to promote from its coverage. This construction was based on the fact that a failure to promote was not seen to result in the "withdrawal or reduction of all or part of [an employee's] pay, allowances, or differentials." *See United States v. Testan*, 424 U.S. 392, 406, 96 S.Ct. 948, 957, 47 L.Ed.2d 114 (1976); *McNutt v. Hills*, 426 F.Supp. 990, 1002(D.D.C. 1977)(Richey, J.).

Brown seeks to evade this result by suggesting that the CSRA's expansion of the term "personnel action" to include "the omission or failure to take an action or confer a benefit" supersedes prior interpretations of the Back Pay Act, and brings the Army's failure to promote him within the scope of the statute. The Court must disagree.

The Court reads the CSRA's amendment as merely broadening the class of wrongful administrative actions which will trigger the Back Pay Act. The CSRA's amendment, however, does not broaden the *effect* which must be shown in order to trigger the Back Pay Act: the "withdrawal or reduction" of an employee's compensation. Contrary to Brown's suggestion, the decisions in *Testan* and *McNutt* had the effect of excluding wrongful failures to promote from the statute because such actions, even if wrongful, do not "withdraw" or "reduce" an

employee's compensation.[12] *See Testan*, 424 U.S. at 407, 96 S.Ct. at 957-58 ("[T]he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a *reduction* in their duly appointed emoluments or position.") (emphasis added). The CSRA's amendment does not alter this analysis in the least. While the CSRA may have expanded the actions (or, more accurately, failures to act) which may *produce* the requisite effects, the requirement that those effects actually be shown remains unchanged. This is the point at which Brown's argument fails. Because a wrongfully withheld promotion does not result in a "withdrawal or reduction" in an employee's compensation--even if it may constitute a "personnel action" -- Brown is not entitled to prejudgment interest pursuant to the Back Pay Act.[13]

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[12] In *Testan*, the Supreme Court noted that the Back Pay Act expressly avoids any intrusion into the federal government's traditional discretion "in determining most matters relating to the terms and conditions of federal employment." 424 U.S. at 406, 96 S.Ct. at 957. The Court continued:

> One continuing aspect of this is the rule, mentioned above, that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position *or claims that he should have been placed in a higher grade*. Congress did not override this rule, or depart from it, with its enactment of the Back Pay Act. It could easily have so provided had that been its intention.
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> 424 U.S. at 406, 96 S.Ct. at 957 (emphasis added).

[13] To the extent the Court's decision conflicts with the results reached in *Parker v. Burnley*, 693 F.Supp. 1138 (N.D. Ga.1988), and *Rollins v. Bennett*, 48 FEP Cases

C. *Permanent Injunction Against Further Reprisals*

The final aspect of the relief which Brown seeks is a permanent injunction against future reprisals: Brown claims that during the pendency of this action the Army stymied his career progress as punishment for his having instituted this and other challenges to the Army's behavior.

Once a statutory violation is found, the issuance of an injunction against future discriminatory actions is by no means mandatory under Title VII. *See Johnson v. Brock*, 810 F.2d 219, 225-26 (D.C.Cir.1987). Nevertheless, the long history of Brown's struggle with the Army, and the Army's repeated unwillingness to accord Brown the equal treatment that is his due, convince the Court that an injunction against future reprisals is appropriate in this case. *See Johnson*, 810 F.2d at 225 (injunction "typical" remedy under Title VII). The Court is concerned that, absent such an injunction, the Army's mistreatment of Brown will continue, albeit in subtle ways that may beyond immediate judicial supervision. The Court thus exercises its discretion in favor of Brown's requested injunction.

The Court shall issue an Order consistent with the foregoing.

ORDER

1172 (W.D. Wash.1988), the Court respectfully disagrees with those decisions. Neither case discussed the rationale of its decision in any detail, and, absent a compelling elaboration by either court, this Court is compelled to part ways with its brethern on this issue.

In accordance with the Opinion of the Court issued on this date, it is by the Court, this 11th day of May, 1989,

ORDERED, that the plaintiff shall have judgment against the defendant for back pay in an amount, to be computed by the defendant, which reflects a retroactive promotion to GS-9, effective August 21, 1975, a retroactive promotion to GS-11, effective October 1, 1978, a retroactive promotion to GS-12, effective June 7, 1981, a retroactive promotion to GM-13, effective May 23, 1982, and compensation at GM-13 from May 23, 1982, to the present, all less amounts actually earned during the above period; and it is futher

ORDERED, that the plaintiff shall for all purposes be deemed to have been promoted to the above levels on the above dates, including the computation of any pertinent cost-of-living allowances; and it is further

ORDERED, that the defendant shall place the plaintiff in a GM-13 position in his area of expertise, with the compensation and benefits appropriate to such a position; and it is futher

ORDERED, that plaintiff shall be deemed to have received a career appointment on April 14, 1976, and defendant shall make all reasonable efforts to shift all Social Security (FICA) contributions made on behalf of the plaintiff between April 14, 1976, and April 17, 1980, to the Civil Service Retirement Fund, with any additional payments that may be required from the employer to be made by the Army, and any additional payments that may be required from the employee to be withheld from the back pay award described above; and it is further

ORDERED, that defendant shall be permanently enjoined, from the date hereof, from engaging in any acts or omissions on account of the plaintiff's race, or in reprisal for the plaintiff's having instituted this or any other action.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. 80-1169 (CRR)

JAMES E. BROWN,

Plaintiff,

v.

JOHN O. MARSH, Secretary of the Army,

Defendant.

Joseph M. Sellers of the Washington Lawyers' Committee for Civil Rights Under Law, Washington, D.C. and John R. Erickson, of Reed, Smith, Shaw & McClay, McLean, Va., for plaintiff.

Jay B. Stephens, U.S. Atty., for the District of Columbia, and John D. Bates, Washington, D.C., and William J. Dempster, Asst. U.S. Attys., for defendant.

OPINION

[Decided May 12, 1988]

CHARLES R. RICHEY, District Judge.

INTRODUCTION

The genesis of this case was plaintiff's 1975 administrative complaint charging that he had been systematically

denied promotions and subjected to unlawful retaliation for filing previous discrimination complaints. After pursuing his claim at various administrative and judicial levels, plaintiff seeks to enforce an Equal Employment Opportunity Commission report finding in his favor. He has moved for partial summary judgment on this theory, and, after carefully considering the legal memoranda, the arguments advanced in open court, and the underlying law, the Court must grant plaintiff's motion.

BACKGROUND

The facts of this case are not in dispute. In 1977, the Army issued a final decision rejecting plaintiff's complaint, and he appealed.[1] In 1981, the Equal Employment Opportunity Commission ("EEOC") remanded a portion of plaintiff's complaint for further investigation and analysis.[2] Because one of the alleged

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[1] Plaintiff appealed to the Administrative Review Board of the Civil Service Commission on July 26, 1977. *Plaintiff's Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, Exhibit 1* (Report of Supplemental Investigation of the Equal Employment Opportunity Commission), at 3. The Civil Service Reform Act of 1978 was enacted while that appeal was pending. That Act abolished the Civil Service Commission and transferred federal equal employment opportunity enforcement to the Equal Employment Opportunity Commission. As a result, plaintiff's appeal was transferred to, and decided by, the EEOC's Office of Review and Appeals. *Id.*

[2] Specifically, the EEOC remanded plaintiff's complaint for further investigation and analysis on the questions (1) whether the failure to select plaintiff for the position of Housing Management Assistant GS 1173-9, Housing Division, Directorate for Industrial Operations (Job An-

discriminators had become the Administrator of the Army's Civilian Appellate Review Agency, the Army did not itself conduct the review but referred plaintiff's complaint back to the EEOC for investigation. *Plaintiff's Exhibit 2* (Letter from W. Gibson to Director, Office of Field Services, Feb. 17, 1981).

Accordingly, the Army and the EEOC entered into a Memorandum of Understanding ("MOU") about the conduct of the EEOC investigation of plaintiff's complaint. *See* 29 C.F.R. § 1613.216(c). In pertinent part, the MOU provided:

> Upon conclusion of the investigation, the District Director of the EEOC Office which investigated the complaint will forward the investigative file to the Agency to continue processing in accordance with 29 C.F.R. § 1613.217 through § 1613.222. Included in the investigative file will be a recommendation as to the disposition of the complaint. This recommendation will be signed by the District Director of the EEOC Office which conducted the investigation.
>
> Upon receipt of the investigative file and recommended finding from EEOC, the Agency will resume responsibility for processing the complaint pursuant to 29 C.F.R. § 1613.217 through 1613.222, subject to the following additional responsibilities and clarifying instructions:
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> > a. The Agency will perform all of its responsibility under 29 C.F.R. § 1613.217(a)

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nouncement F-125-75), was due to race or reprisal, and (2) whether the failure to convert plaintiff from an overseas limited appointment to career status in a timely manner was due to race. *Plaintiff's Exhibit 1*, at 4.

> and (b) within 30 days following the day on which the investigative file and recommended disposition are received from the EEOC District Office. *If, on the 31st day following this receipt of the file, the Agency has neither entered into a written adjustment of the complaint nor notified the complainant in writing of its proposed disposition, the Agency will adopt EEOC's recommended disposition as its proposed disposition of the complaint.* The Agency will promptly notify the complainant of the proposed disposition and of his/her rights under 29 C.F.R. § 1613.217(b).

Plaintiff's Exhibit 3, § B, ¶ 3, § C, ¶ 5(a).

It is the timing and character of defendant's actions that are at issue in this case. On October 31, 1985, the EEOC issued its "Report of Supplemental Investigation," which found in plaintiff's favor and recommended his retroactive promotion with full backpay and other appropriate relief. *Plaintiff's Exhibit 1.* The Report was accompanied by a cover letter signed by an agent for the EEOC's District Director. Defendant received this Report on or before November 4, 1985. *Plaintiff's Exhibit 6.* On December 9, 1985 -- 39 days after the Report was sent and 35 days after defendant received it -- defendant returned the Report to the EEOC because it was not signed by the EEOC's District Director, as required by the Memorandum of Understanding. *Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment, Exhibit ("Defendant's Exhibit") A.*

BECAUSE THE ARMY'S REJECTION OF THE EEOC DECISION WAS UNTIMELY, PLAINTIFF IS ENTITLED TO PARTIAL SUMMARY JUDGMENT.

Defendant admits that he received the EEOC's "Supplemental Report" on plaintiff's complaint on November 4, 1985. He admits that the Memorandum of

Understanding gave him thirty days in which to "enter into a written adjustment of the complaint" or inform plaintiff that he had rejected the EEOC decision; he also admits, as he must, that the Memorandum of Understanding clearly states that he would be deemed to have adopted the EEOC decision by default if he failed to take these specified actions in a timely fashion. *Memorandum of Understanding, Plaintiff's Exhibit 3. § C, ¶ 5(a); see also 29 C.F.R. § 1613.220(d).* He further admits that his only action was to return the "Supplemental Report" to the EEOC on December 9, 1985, more than thirty days after he received it.

In light of the clear language of the Memorandum of Understanding, these facts would seem inescapably to lead to the conclusion that defendant's action was untimely. Defendant, however, argues that the Memorandum of Understanding's requirements apply only if the EEOC recommendation complied in all particulars with the Memorandum of Understanding. Because the District Director had not signed the October 31, 1985, "Supplemental Report," as the Memorandum of Understanding contemplated, defendant argues that he was not required to return the "Supplemental Report" for the District Director's review within that thirty-day period.

This argument flies in the face of the Memorandum of Understanding's unambiguous language, which specifies that the agency "will adopt" the EEOC decision unless it timely notifies plaintiff of its rejection or it enters into a written adjustment of the complaint. As defendant admits that he neither adjusted the complaint nor notified plaintiff within that thirty-day period, defendant can find little comfort in the Memorandum.

The Memorandum of Understanding also states that the agency was responsible for processing the administrative

decision in accordance with the governing regulations.[3] *See Plaintiff's Exhibit 3, at § C, ¶ 5(a).* Defendant attempts to rely on the regulations as well, but, like the Memorandum of Understanding, the regulations offer defendant no comfort.

Under the regulations, an EEOC decision is binding upon an agency unless it "adopts, rejects, or modifies" the decision within thirty days after receiving it. *29 C.F.R. §§ 1613.220(d); 1613.221(b)(2); see also, e.g., Noble v. Herrington*, No. 85-1507 (D.D.C. Feb. 16, 1988), slip op. at 3-7. No court has decided whether an agency "rejects" an EEOC decision, within the meaning of 29 C.F.R. § 1613.221(b)(2), when it finds that the EEOC has failed to abide by the precise terms of a Memorandum of Understanding and returns the decision to the EEOC for a decision that comports in all respects with a Memorandum of Understanding. Consequently, the Court cannot look to case law but must rely only on logic. And logic is precisely what defendant's argument lacks.

Essentially, defendant argues that he must reject an EEOC decision within thirty days if he disagrees with the substance of the decision, but he faces no time limitation if he finds the decision procedurally wanting, as he did here. Taken to extremes, defendant suggests that, while

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[3] The Memorandum of Understanding states that the regulations ordinarily governing agency processing of EEOC complaints apply to plaintiff's complaint "subject to the following additional responsibilities and clarifying instructions." *Plaintiff's Exhibit 3, at § C, ¶ 5.* Neither party has claimed that the regulations governing agency action on an EEOC decision were changed by any such "clarifying instructions." While the Court believes that it may be possible to argue that the Memorandum of Understanding actually supplanted the regulations in pertinent part, it need not and will not address that question.

he has a month to reject an EEOC decision on substantive grounds, he could take years -- and conceivably need never act -- if he would reject the decision for failing to comply with a procedural requirement. This argument is unsupportable.

Nothing in the regulations (or the Memorandum of Understanding) suggests that an agency's rationale for rejecting an EEOC decision can or should affect the amount of time in which the agency can issue that rejection. Rather, by allowing an agency thirty days to "adopt, reject, or modify" an EEOC decision, the regulations (and the Memorandum of Understanding) extend that time limitation to *all* agency actions with respect to an EEOC decision. There is simply no basis for the Court to read the word "reject" in the regulations as if it says "reject on substantive grounds."

Ostensibly to support his position, defendant notes that he did not notify plaintiff when he returned the decision to the EEOC. Had this "return" been a "rejection," defendant argues, he would have been required to notify plaintiff of that fact. Because he did not notify plaintiff, he maintains, he did not "reject" the EEOC decision when he returned it because it was unsigned.

The Court cannot believe that defendant advances this Alice-in-Wonderland argument seriously. The tautology is too obvious: defendant points to his failure to comply with required procedures as proof that he did not have to comply with required procedures. Indeed, rather than suggest an excuse for defendant, this argument proves nothing but defendant's failure to comply with the regulations in any respect.

Thus, the Court finds that, by returning the October 31, 1985 decision to the EEOC on December 9, 1985, defendant was attempting to reject the EEOC decision more than thirty days after receiving it. Because defendant was obligated, under both 29 C.F.R.

§ 1613.221(b)(2) and the Memorandum of Understanding, to reject the decision within thirty days of receipt, defendant's action was untimely. As a result, defendant must be deemed to have adopted the decision, pursuant to Section C, paragraph 5(a) of the Memorandum of Understanding, and plaintiff is entitled to enforce the EEOC decision in this Court. *See Noble v. Herrington*, 85-1507 (D.D.C. Feb. 16, 1988), slip op. at 3.7.[4]

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[4] Plaintiff advanced another argument in support of his partial summary judgment motion. This argument centers on defendant's treatment of the findings and recommendations issued by the EEOC after the Army returned and rejected the EEOC's initial finding in plaintiff's favor. On December 27, 1985, the EEOC again sent the Army its findings and recommendations with respect to plaintiff's complaint; this decision was identical to the October 31, 1985, decision in plaintiff's favor, except that it was signed in the EEOC District Director's name, apparently by her authorized agent. (Defendant has never tried to return this decision to the EEOC on the grounds that, like the October 31 decision, it was never signed by the District Director).

Plaintiff maintains that the agency was obligated to act on the December 27, 1985, decision within thirty days after the EEOC sent it to defendant. As the Memorandum of Understanding states that the thirty-day period runs for agency action begins "upon receipt of the investigative file and recommended finding," there is no basis for plaintiff's argument. Plaintiff also suggests that, even if the Court looks at the date of receipt by the agency, the agency's action was untimely. This is not true. Plaintiff's own exhibit shows that the Department of Defense mailroom received the EEOC decision on January 3, 1986. As defendant rejected the decision on January 31, 1986, he acted within the allotted thirty-day period and the rejection was timely. Nor does it matter

CONCLUSION

Defendant has advanced a hypertechnical argument to defeat a discrimination claim by a Title VII plaintiff. In one sense, defendant's action is puzzling, as defendant is well aware that a court must look leniently upon a Title VII plaintiff and will not allow technical deficiencies to defeat recovery. *See, e.g., Brown v. Marsh*, 777 F.2d 8, 14 (D.C. Cir. 1985). But defendant's action is not inexplicable; it is just the latest example of defendant's intransigent unwillingness to "assess its losses and find a modus vivendi with Mr. Brown." *Id.* at 18. As the Court of Appeals for this Circuit noted in the 1985 appeal of an earlier portion of this case, "it is certainly past time for all the many parts of this litigation to come to an end." *Id.*

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that plaintiff did not receive notice of the rejection until February 4, 1986. The Memorandum of Understanding obliges the agency to notify plaintiff of the rejection within thirty days after receiving the complaint; it does not require the agency to ensure that plaintiff receives that rejection within the thirty-day period. *Plaintiff's Exhibit 3, at § C, ¶ 5(a).*

There is a genuine question, however, whether the Army's rejection constituted a legitimate final rejection of the EEOC's decision. The Army has never advanced reasons for its rejection, as required by 29 C.F.R. § 1613.221(b)(2), and in fact admits that it has never issued a "final decision" on this action. *Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment*, at 3 n. 3. As the regulations state that the EEOC's decision is binding upon the agency unless it issues a "final decision" within 180 calendar days after the administrative complaint was filed, defendant has *admitted* that it must be bound by the EEOC's December 27, 1985, decision.

Because the Court finds that defendant's actions with respect to the EEOC's October 31, 1985, "Supplemental Report" constitute an untimely rejection of the Report's findings in plaintiff's favor, the Court finds that defendant adopted the "Supplemental Report." Accordingly, the Court will grant plaintiff's motion for partial summary judgment, and will issue an Order, of even date herewith, memorializing this Opinion.

ORDER

In accordance with the Opinion in the above-captioned case, issued of even date herewith, and for the reasons set forth therein, it is this 12th day of May, 1988,

ORDERED that plaintiff's motion for partial summary judgement shall be, and hereby is, granted; and it is

FURTHER ORDERED that the findings and recommended decision in the Report of Supplemental Investigation of the Equal Employment Opportunity Complaint of James E. Brown, Department of the Army, dated October 31, 1985, shall be, and hereby are, adopted as the findings and decision of this Court; and it is

FURTHER ORDERED that judgment shall be entered in favor of the plaintiff to the extent required by the Court's adoption of the EEOC decision in the Report of Supplemental Investigation, specifically:

-- judgment shall be entered in favor of the plaintiff on his claim of discrimination by reason of reprisal, and

-- judgement shall be entered granting plaintiff a promotion to a GS-9 position similar to the position denied him, and such promotion shall be retroactive to August 21, 1975, and

-- judgment shall be entered awarding plaintiff backpay, including all within-grade increases, pay adjustments, and

any promotions that may have accrued by way of restructuring or reclassification of that type of job; and it is

FURTHER ORDERED that the parties shall appear for a status call on June 17, 1988, at 10:00 a.m,

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. 82-3020 (CRR)

WELLINGTON H. MITCHELL,

Plaintiff,

v.

SECRETARY OF COMMERCE,

Defendant.

Joseph M. Sellers, Washington Lawyers' Committee for Civil Rights Under Law, and Barry J. Reingold, Perkins Coie, Washington, D.C. for plaintiff.

Jay B. Stephens, U.S. Atty. for District of Columbia, John D. Bates and George P. Williams, Asst. U.S. Attys., for defendant.

ORDER

[Entered July 17, 1989]

CHARLES R. RICHEY, District Judge.

The plaintiff Mitchell is the prevailing party in a Title VII action. In its opinion dated September 2, 1988, the Court found, following trial, that the Department of Commerce (the "Department") had discriminated against

Mitchell on the basis of his race in denying him a promotion. The Court retroactively awarded Mitchell the promotion, along with back pay.

Mitchell subsequently moved for additional relief, including the entry of a permanent injunction against further acts of discrimination, and interest on the back pay award.[1] Mitchell's entitlement to this additional relief has been fully briefed by the parties, and is now ripe for decision. The Court has determined to grant the requested injunction, but will deny Mitchell's request for interest on the award of back pay.

Injunctive Relief

In its Opinion of September 2, 1988, the Court initially denied Mitchell's request for injunctive relief. That decision, however, was predicated upon the understanding that Mitchell was soon to retire from the Department, and that an injunction would therefore constitute an empty gesture.

The Court is now informed that Mitchell, in fact, has not retired, and that he has no intention of retiring anytime soon. Further, the court is informed that the Department's handling of Mitchell's recent sick leave[2] suggests that the Department may resent Mitchell's willingness to successfully litigate his claims. Under these circumstances, the entry of a permanent injunction against future acts of discrimination or retaliation against Mitchell would appear to be prudent. The Court is concerned that,

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1 Mitchell sought other forms of additional relief, but the permanent injunction and the interest award are the only issues as to which agreement has not been reached among the parties.

2 Necessitated by an automobile accident during the summer of 1988.

absent such an injunction, the Department's mistreatment of Mitchell will continue, albeit in subtle ways that may be beyond immediate judicial supervision. The Department shall be permanently enjoined, from the date hereof, from engaging in any acts or omissions on account of Mitchell's race, or in reprisal for Mitchell's having instituted this or any other action.

Interest on Award of Back Pay

The Court initially awarded Mitchell back pay in an amount equal to the difference between what he has actually earned and what he would have earned had he received the promotion at issue. Mitchell now seeks interest on that award. Because the Court is of the view that, under the circumstances of this case, such an award would contravene the federal government's sovereign immunity, and that Congress has not expressly waived this sovereign immunity in either Title VII itself or the Back Pay Act, 5 U.S.C. § 5596, Mitchell's request shall be denied.

The Department discriminated against Mitchell in failing to promote him, because of his race, to a position for which he had applied. Accordingly, as it is specifically authorized to do, the court awarded Mitchell back pay under §§ 717(d) and 706(g) of Title VII, 42 U.S.C. §§ 2000e-16(d) and 20003-5(g).[3] As Mitchell concedes, however, Title VII itself nowhere authorizes the award of interest, whether on back pay or any other form of monetary relief. *See generally, Loeffler v. Frank*, _____ U.S. _____, 108 S.Ct. 1965, 100 L.Ed.2d 549 (1988); *Library of Congress v. Shaw*, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). Absent such express statutory

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[3] Section 706(g) specifically permits a court to "order such affirmative action as may be appropriate . . . includ(ing) . . . back pay . . . , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 20003-5(g).

authorization, Title VII cannot be read to represent an intentional waiver by Congress of the sovereign immunity that otherwise protects the federal government from interest awards of any kind. *See Shaw*, 106 S.Ct. at 2961 ("In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.").

That is not to say however, that Congress may not expressly waive sovereign immunity as to an interest award under Title VII through other legislative enactments. For instance, in *Loeffler*, the Supreme Court determined that because the Postal Reorganization Act, 39 U.S.C. § 401(1)(the "PRA), allows the Postal Service to "sue and be sued' as a private person, it must be treated as a private person for purposes of an action against it under Title VII. 108 S.Ct. at 1970. And, because interest may be assessed against a private defendant under § 706(g) of Title VII, *see, e.g. Green v. USX Corp.*, 843 F.2d 1511, 1530 (3rd Cir. 1988), the Court construed the PRA's "sue and be sued" clause as representing as express waiver of the sovereign immunity that would have otherwise have barred the assessment of interest against the Postal Service in a Title VII suit.

Mitchell argues that the Back Pay Act serves the same purpose here as the PRA's "sue and be sued" clause served in *Loeffler*, i.e., that it waives the sovereign immunity that would otherwise protect the Department against an interest award. Although the court is prepared to accept this as a general proposition,[4] it cannot agree

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[4] If accurate, the notion that the Back Pay Act waives the federal government's sovereign immunity against interest on back pay would seem to dispose of the dispute in *Loeffler*, which arose over precisely this issue. However, the provision for interest under the Back Pay

that in the context of this case--which involves a failure to promote--the Back Pay act has any legitimate application.

As always, and particularly so when waivers of sovereign immunity are at issue, the Court begins with the statutory language. The Back Pay Act grants federal employees the right to receive back pay, and interest thereon, when they have been affected by "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances or differentials of the employee," 5 U.S.C. § 5596(b)(1). Further, the Back Pay act includes within the class of "personnel actions" that will trigger its provisions "the omission or failure to take an action or confer a benefit." § 5596(b)(4). Mitchell contends that the latter-quoted language is sufficiently broad to cover a failure to promote of the type at issue here; accordingly, he contends that the Back Pay Act should be read to authorize an award of back pay and interest under the circumstances of this case, and thus to have waived the sovereign immunity of the federal government as to an award of interest.

The Court cannot agree. The language of the statute controls.[5] And the express terms of the Back Pay Act

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Act, 5 U.S.C. § 5596(b)(2)(A), was added in 1987, and thus predates the lower court's decisions in *Loeffler*. Accordingly, the effect of the Back Pay Act was not before the Supreme Court.

[5] The Court must be chary of finding waivers of sovereign immunity where none exist, for "there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or

provide that it shall be effective only when the "unwarranted personnel action" being challenged results in the "withdrawal or reduction" of an employee's compensation. The Court simply cannot conclude that the failure to promote an employee, even where that failure is wrongful, as it was here, results in the "withdrawal or reduction" of an employee's compensation. *United States v. Testan,* 424 U.S. 392, 406, 96 S.Ct. 948, 957, 47 L.Ed.2d 114 (1976); *Donovan v. United States,* 580 F.2d 1203, 1207-08 (3d Cir. 1978); *McNutt v. Hills,* 426 F.Supp. 990, 1002 (D.D.C. 1977); *Predmore v. Allen,* 407 F.Supp 1067, 1072-74 (D.Md. 1976).

Mitchell places great reliance upon the amendments to the Back Pay Act brought by the Civil Service Reform Act of 1978 (the "CSRA"). These amendments, *inter alia,* expanded the definition of "personnel action" to include the "omission or failure to take an action or confer a benefit." Yet, while these amendments arguably brought an employer's unlawful failure to promote within the definition, they did not, at the same time, dispense with the congressionally-imposed requirement that the "personnel action" cause a "withdrawal or reduction" in the employee's compensation. This fact, in the Court's view, is fatal to Mitchell's argument.

In amending the Back Pay Act, Congress must be presumed to have understood the rationale of cases such as *Testan, Donovan* and *Predmore.* These cases rested their holdings, not on the types of "personnel actions" at issue, but on the fact that those actions--misclassifications

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contractual terms." *United States v. New York Rayon Importing Co.,* 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1974). *See also Ruckelshaus v. Sierra Club,* 463 U.S. 680, 685-86, 103 S.Ct. 3274, 3278, 77 L.Ed.2d 938 (1983) (a waiver cannot extend "beyond what the language requires").

and failure to promote--did not result in the type of *effect* required by the statute. *See Testan*, 424 U.S. at 407 96 S.Ct. at 957 ("[T]he Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a *reduction* in their duly appointed emoluments or position." (emphasis added); *Donovan*, 580 F.2d at 1207 ("The unwarranted failure timely to promote plaintiff in accordance with Army regulations, though a wrongful act, is not the type of personnel action calling for back pay under the Back Pay Act, for the action has not caused plaintiff to suffer any reduction in grade but has only delayed his advancement to a higher level."); *Predmore*, 407 F.Supp. at 1074 ("Predmore [the victim of failure to promote on the basis of her sex] has not been 'subjected to reduction in' her 'duly appointed emoluments or position'.) (quoting *Testan*). Congressional intent can be inferred most clearly from congressional action, and the action taken by Congress in 1978 in no way undermined the rationale of those cases. This fact must be viewed in the light of the Court's duty to construe alleged waivers of sovereign immunity strictly in favor of the sovereign. *See Shaw*, 106 S.Ct. at 2963. The Court cannot conclude that, with respect to an unlawful failure to promote, the Back Pay act effects a waiver of the sovereign immunity that would otherwise obtain, and that it therefore permits the assessment of interest on an award of back pay under Title VII. Mitchell's request for such interest shall be, and hereby is, denied.[6]

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[6] The Court concedes that, as Mitchell points out, several administrative decisions are to the contrary. Moreover, the Court recognizes that the decisions in Parker v. Burnley, 693 F.Supp. 1138 (N.D. Ga. 1988) and *Rollins v. Bennett*, 48 FEP Cases 1172 (W.D. Wash. 1988) are inconsistent with this decision. Nevertheless, the Court respectfully feels compelled to part ways with those who have decided this question, concededly a difficult one, in a different way.

SO ORDERED.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. 82-3020 (CRR)

WELLINGTON H. MITCHELL,

Plaintiff.

v.

SECRETARY OF COMMERCE,

Defendant.

MEMORANDUM OPINION AND ORDER

[Entered Sept. 2, 1988]

CHARLES R. RICHEY, District Judge.

Plaintiff is a black male who has worked for the National Weather Service (NWS) of the defendant agency[1] in the computer field since January, 1975. At this time, he is a GS-12, Step 8 employee. In 1979, he applied for a promotion to a GS-13 job pursuant to a Vacancy

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[1] Plaintiff originally sued the then-Secretary of Commerce by name, although he was sued in his official capacity. Pursuant to Fed. R. Civ. P. 25(d), the Court has substituted the official title for the named defendant.

Announcement for the position of the agency's Data Base Administrator.

Plaintiff did not get that promotion, and he claims that race or color discrimination was the reason he was not selected. Defendant denies this. The Court held a trial in this case in October, 1987.[2] After carefully considering all the testimony and the exhibits offered in evidence, the Court concludes that the plaintiff more likely than not was the victim of race discrimination and that the allegedly non-discriminatory reasons for selecting someone other than plaintiff were pretextual. This Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P.52(a).

The only issue in this disparate treatment case is whether Mr. Mitchell was denied the promotion he sought on account of race or color. The facts proved at trial document that the selection process for that job was tainted with the racially discriminatory animus of plaintiff's immediate supervisor.[3] That animus found its

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[2] This is plaintiff's second trial before this Court. He filed this suit in 1982 and asserted both discrimination and reprisal claims. The Court conducted a trial of the suit in January, 1984 and dismissed the suit pursuant to Fed. R. Civ. P. 41(b) after presentation of plaintiff's case-in-chief. The Court of Appeals for this Circuit upheld this Court's dismissal of plaintiff's reprisal claim. Mitchell v. Baldrige, 759 F.2d 80 (D.C. Cir. 1985). However, the Court of Appeals remanded the case for further proceedings on the issue of race or color discrimination because this Court did not allow plaintiff to reopen his case-in-chief for the purpose of rebutting defendant's non-discriminatory explanation of its decision. *Id.*

[3] The Court has had to prepare this Opinion without the benefit of a transcript of the trial. Accordingly, the

victim in Mr. Mitchell.

Richard Thigpen, a white male, was plaintiff's immediate supervisor. Prior to plaintiff's application for the promotion at issue, Mr. Thigpen had consistently rated plaintiff's work "very good' or "good." Once plaintiff applied for the promotion, however, these ratings changed. Mr. Thigpen had to evaluate plaintiff as part of the application process for the promotion; now that plaintiff was applying for a better job, Thigpen gave him low performance ratings. Understandably unhappy about these ratings, Mr. Mitchell filed a grievance claiming, inter alia, that Mr. Thigpen's attempt to block his career advancement was motivated by race discrimination.

This marginal performance rating at first promised to have little impact on plaintiff's chances for the promotion. Ms. Neila Summers Talley, defendant's personnel specialist, was in charge of the initial review of applicants for the job, and she rated plaintiff among those "best qualified" for the position. This favorable rating, however, was soon countermanded by Mr. Thigpen's inclusion in the evaluation team for the job plaintiff sought.

Despite the facts that Mr. Thigpen had already evaluated at least one candidate for the job (plaintiff) and that he was the subject of an employee grievance by that candidate, defendant named Mr. Thigpen as Subject Matter Specialist and Advisor to the Manpower Utilization Council (MUC) that would recommend the "best qualified" candidates to the selecting official. Mr. Thigpen proceeded to sandbag the plaintiff by informing MUC members, outside plaintiff's presence and without any opportunity for rebuttal by plaintiff, that

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Court has had to rely on its recollections and its notes (as well as the parties' proposed Findings of Fact and Conclusions of Law) when drafting this Opinion.

plaintiff had misrepresented his prior work experience and qualifications for the promotion on his Form 171.

Without informing plaintiff of these charges or giving him a chance to rebut them, and without attempting to verify them, the MUC accepted Thigpen's charges. In most cases, resume tailoring and exaggeration is not treated seriously. The testimony showed that such "puffing" is regarded as nothing more serious than a candidate's attempt to put his or her best foot forward, and it is common -- and even encouraged -- throughout the defendant agency and the Civil Service system. But, in Mr. Mitchell's case, Thigpen's charges were decisive. Because of these allegations, the MUC downrated plaintiff and thereby eliminated him from consideration for the promotion. Adding insult to this injury, plaintiff was given a one-day suspension for his alleged misrepresentations.

The true nature of Mr. Thigpen's animus was revealed at trial, where the Court heard undisputed testimony that Mr. Thigpen knew that the candidate who was ultimately selected for the job in question, like many other candidates for the job, had exaggerated his experience and qualifications much as Mr. Mitchell had. Mr. Thigpen did not bring this information to the MUC's attention. Nor did he see that any action was taken against any individual suspected of misrepresenting his background except for Mr. Mitchell.

The candidate selected for the job at issue was Richard Thowart, a white male of younger age than plaintiff. The Court heard convincing expert opinion testimony that plaintiff was better qualified than Mr. Thowart; despite notice via plaintiff's pre-trial filing of a Rule 26(b)(4) statement setting forth the precise content of the opinion testimony, defendant did not effectively impugn that testimony on cross-examination and it offered no expert opinion testimony of its own. From this and the totality of the testimony at trial, the Court must conclude that

plaintiff was better qualified than Mr. Thowart for the position at issue than was plaintiff and in fact was well qualified for the job.

From these facts, it is apparent that plaintiff, a black male, belongs to a protected minority, applied for and was qualified for a job for which defendant was seeking applicants, was rejected despite his qualifications, and watched defendant fill the job with a white male of inferior qualifications. Thus, plaintiff has successfully proved a *prima facie* case of racial discrimination. *See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Hopkins v. Price Waterhouse*, 825 F.2d 458, 470 (D.C. Cir. 1987).

While defendant has articulated an ostensibly non-discriminatory reason for failing to promote plaintiff, the evidence clearly shows that this reason was a pretext for discrimination. Defendant, through its agents, singled plaintiff out and prohibited his advancement because of the same resume-puffing that rewarded Mr. Thowart with the job in question. The Court must infer from the totality of the evidence at trial, giving such weight and credibility to that evidence as the Court sees fit, that the assertion of plaintiff's ineligibility for the job at issue was a pretext for race discrimination. *See Hopkins v. Price Waterhouse*, 825 F.2d at 470 (court may properly infer pretext or discrimination from evidence).

Thus, the Court has found that plaintiff is entitled to relief under 42 U.S.C. § 2000e-16. Such relief must be designed to make plaintiff whole for the injury inflicted by the unlawful discrimination. *See, e.g., Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Accordingly, the Court will order that plaintiff be promoted to the GS-13 level retroactive to March, 1980, and that he receive back pay reflecting the difference in salary between the amount he has actually earned and what he would have earned absent discrimination. The Court will also entertain any application for attorney's fees and costs submitted by the

lawyers who participated in *this particular phase* of plaintiff's lawsuit.

Plaintiff has also asked for injunctive and declaratory relief. Although such relief may sometimes be proper in a Title VII case, *see, e.g., Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the Court does not believe it is appropriate here. The record does not disclose whether the personnel who inflicted plaintiff's injury remain employed at the defendant agency; it does indicate that plaintiff himself is approaching retirement (if not already eligible for it) and thus has limited interest in the agency's future conduct. Accordingly, the Court will not enjoin defendant from future acts of discrimination, but it will simply note that defendant must never forget that it is subject to the precepts and commands of the civil rights laws.

This is the end of a long saga for Mr. Mitchell and for this Court. It has been almost *nine years* since Mr. Mitchell was wrongfully denied a job he wanted, and he has pursued his claims at every possible level with great vigor. Mr. Mitchell now stands here not as a thorn in the side of the judiciary but as a wronged party entitled to justice. It is past time for the judicial system, and the defendant agency, to make up to Mr. Mitchell for those uneasy years of waiting.

The Court will enter an Order memorializing these findings, and it will say finally that it is grateful for the professionalism and help that counsel for both parties rendered during the pre-trial phase and the trial of this case.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. 82-3020 (CRR)

WELLINGTON H. MITCHELL,

Plaintiff,

v.

SECRETARY OF COMMERCE,

Defendant.

ORDER

[Entered Sept. 2, 1988]

In accordance with the Opinion in the above-captioned case, issued of even date herewith, and for the reasons set forth therein, it is this 2nd day of September, 1988,

ORDERED that the official title "Secretary of Commerce" shall be, and hereby is, substituted for the named defendant; and it is

FURTHER ORDERED that judgment shall be, and hereby is, entered in plaintiff's favor; and it is

FURTHER ORDERED that plaintiff shall be promoted to the GS-13 level retroactive to March, 1980, and it is

FURTHER ORDERED that plaintiff shall receive back pay reflecting the difference in salary between the amount he has actually earned and the amount he would have earned had he been promoted to the GS-13 level in March, 1980; and it is

FURTHER ORDERED that this case shall stand dismissed from the docket of this Court, although the Court shall retain jurisdiction to consider any petition plaintiff may file for attorney's fees and costs.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

FEDERAL PERSONNEL MANUAL, SUBCHAPTER 8.
BACK PAY (June 16, 1977)
S8-4 ENTITLEMENT

. . . .

b. **Basic entitlement.** (1) To be entitled to the benefits of section 5596 of title 5, United States Code, all of the following criteria must be met:

(a) The act of commission or of omission resulted in an actual withdrawal, reduction, or denial of the pay, allowances, or differential of an employee.

(b) The action taken or inaction by an authorized official must later be determined to be an unjustified or unwarranted personnel action.

(c) The personal action has been made the subject of review by an appropriate authority, as defined in this subpart. on its own initiative, or because of a timely appeal, grievance, or claim against the Government by an employee.

(d) The appropriate authority as defined in, this subpart, has made a finding that an unjustified or unwarranted personnel action is to be corrected, consistent with applicable law, Executive order, or regulation.

(2) In order for an employee to be entitled to back pay under section 5596 of title 5, United States Code, it must clearly be established that, *but for* the unjustified or unwarranted personnel action, the employee would actually have been entitled to receive the pay, allowances, or differential which are in question. For example, in the case in which an employee alleges that he had been improperly denied a promotion and a finding by appropriate authority is made that a nondiscretionary provision has been violated, the employee, nonetheless, would not be eligible for back pay if the employee would have been only one of several qualified candidates for the promotion and the factual record does not clearly establish that the employee would have been selected. Such an

employee, however, would be entitled to back pay if it is clearly established by appropriate authority that, under applicable law, Executive order, regulation, or collective bargaining agreement, the employee would have been selected for the promotion, *but for* the unjustified or unwarranted personnel action. (Comptroller General decision B-180010, December 2, 1974, 54 Comp. Gen. 435; *id* B-180010, March 19, 1975)

(3) An agency is not prevented from awarding back pay on its own initiative upon acknowledging and correcting the unjustified or unwarranted personnel action. An agency is also permitted to take corrective action in those cases in which no appeal is available to the employee concerned. An employee, however, has a right to submit a claim to the General Accounting Office either as a first step in seeking redress or because of a disallowance by his or her agency.

(4) For purposes of determining that an unjustified or unwarranted personnel action can be corrected, the statutes of limitation that apply with regard to an employee filing a claim against the Government, or any regulatory limitation or submitting an appeal or a grievance, also apply. Back pay may be effected only if the statute of limitation is not exceeded and only if the claim, appeal, or grievance has been accepted as timely filed by the administrative body having jurisdiction over the claim, appeal, or grievance.

. . . .

54 Comp. Gen. 312 (1974)
In the matter of a retroactive promotion with backpay pursuant to arbitration award, October 31, 1974:

This matter involves a request for a decision as to whether the National Labor Relations Board (NLRB) has the authority to comply with an arbitrator's award and grant an employee of that agency a retroactive promotion with appropriate backpay.

The question arises as the result of an arbitrator's decision issued pursuant to an arbitration hearing under a collective bargaining contract between the General Counsel of the NLRB and the National Labor Relations Board Union. The arbitrator found that the General Counsel had improperly filled a clerical vacancy in his office by selecting an applicant from outside the agency and thereby rejecting four admittedly "well-qualified" applicants who were already employed by the agency. The arbitrator found that such selection and concurrent rejections violated the contractual provision of the collective bargaining agreement calling for filling vacancies by promotion or reassignment of persons already employed in the agency, provided their qualifications are equal to those of applicants from other sources.

The provision which the arbitrator found was violated is in Article IX of the collective bargaining agreement, which reads as follows:

ARTICLE IX

Clerical Promotions

Section I. Introduction--The parties agree that the mission and responsibilities of the Office of the General Counsel in the enforcement of the national Labor Relations Act, as amended, demand a high degree of staff effectiveness. It is therefore the policy of the General Counsel:

a. to obtain and retain the best personnel available and to utilize as fully as possible all valuable and appropriate experience.

b. to fill vacancies by promotion or reassignment of persons already employed in the Agency, provided their personal qualifications, training and experience are equal to those of applicants from other sources.

c. that recruitment from outside the Agency is usually resorted to only to fill positions at the entrance level or to fill positions for which eligibles are in short supply or to appoint individuals who will add to the personnel resources of the Agency.

* * * * * *

Section 2. All promotions will be made in accordance with this agreement, the Agency's Merit Promotion Regulations, and related Civil Service Regulations.

Since the agency admitted that the four agency applicants were at least as well qualified as the applicant from outside the agency, the arbitrator found that the agency should have selected one of the four agency applicants for the position in question in accordance with the agreement. The General Counsel has admitted that the contract was violated but questions whether he may properly implement the arbitration award in its entirety. That award directed the General Counsel to select, on some basis consistent with the agreement and with applicable law, one of the four agency applicants to fill the position given the nonagency applicant and to "make the applicant so selected whole for any loss of wages which she sustained by not being given that position, starting with the date the position was first filled" by the employee selected from outside the agency.

The General Counsel states that in compliance with the award he has selected one of the four agency applicants

for the position, but in view of the Court of Claims decision, *Chambers v. United States*, 451 F.2d 1045 (1971), on the question of retroactive backpay, he has decided to submit the matter to this Office for a decision as to the propriety of paying the ordered backpay. The General Counsel points out that prior to the *Chambers* decision, both the Court of Claims and the Comptroller General had ruled consistently that promotions may not be made retroactively effective so far as the payment of backpay is concerned and refers to our decisions, 32 Comp. Gen. 527 (1953), 33 *id.* 140 (1953), and 50 *id.* 850 (1971). He cites the rule stated in 33 Comp. Gen. 140 that this Office "has never sanctioned retroactive promotions so far as the payment of salary is concerned."

It is the position of the General Counsel of the NLRB that his agency should have the authority to comply with the arbitrator's award with respect to the payment of backpay to make the employee whole for the losses suffered by not being selected for the position in question. These views are based on the conviction that in order to give meaningful effect to Executive Order 11491, as amended, and the collective bargaining agreement entered into pursuant thereto, it is essential that "binding" arbitration, when agreed to, means just that. The General Counsel further states that this is especially true in labor-management relations in the public sector where, unlike the private sector, neither employees nor unions have any self-help and therefore must rest their hopes with the arbitrator. He states that an agency's inability to comply fully with an arbitrator's award does nothing to enhance meaningful and peaceful labor relations in the Federal sector. Therefore he requests that we issue a decision that will authorize the agency to comply fully with the arbitration award in this case by paying backpay to the employee in question as directed by the arbitrator.

Both the National Labor Relations Board Union and the American Federation of Government Employees requested and received permission to submit briefs with

this Office in the matter. The National Labor Relations Board Union, in its brief, points out that the decision of the arbitrator in this case does not violate applicable law, regulation, or Executive Order 11491 and that the award of ordering the agency to select one of the four agency applicants for the position in question constitutes a *sine qua non* for ensuring adherence to the collective bargaining agreement and thus for giving full implementation to the Executive Order. It is argued that not giving effect to the award would allow the agency to violate the contract with impunity and would nullify the effect of the collective bargaining agreement, as to both its substantive provisions and as to an arbitration procedure provided therein. The American Federation of Government Employees stated that at issue is whether an arbitration award made pursuant to a negotiated procedure providing for binding arbitration, as authorized by Executive Order 11491, as amended, represents a valid exercise of an agency's administrative discretion in accordance with stated agency policy and is, therefore, binding upon that agency.

This case involves, in addition to the question of whether the particular employee involved may be granted a retroactive promotion as a result of the agency's violation of the collective bargaining agreement, the broader question, addressed in all the submissions to this Office in the matter, of the value and effect of a provision in a collective bargaining agreement calling for binding arbitration of disputes over the interpretation and application of that agreement, including the authority of an agency to comply with a binding arbitration award, and the relationship of decisions of the Comptroller General of the United States to those awards.

The policies governing relationships between agencies of the executive branch of the Government and Federal employees and organizations representing those employees are outlined in Executive Order 11491, as amended by Executive Order 11616 of August 26, 1971, 3 C.F.R. 254. Section 11 of that order sets forth the guidelines covering

negotiation of agreements and provides that an agency and a labor organization may negotiate with respect to personnel policies and practices and matters affecting working conditions so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and the Executive order. Under section 12, each agreement is subject to certain retained rights of the agency and the administration of all matters covered by the agreement are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

We believe that once an agreement with a labor organization is approved under section 15 of Executive Order 11491, and the provisions of the agreement are consistent with laws and regulations and within the guidelines of sections 11, 12 and 13 of the Executive order, then, unless otherwise specifically provided in the agreement, such provisions become nondiscretionary agency policies. Further, we believe that when an agency, in its discretion, chooses to agree to binding arbitration, then a decision of an arbitrator, *if otherwise proper*, becomes, in effect, the decision of the head of the agency involved. Therefore, regarding the weight which this Office should give to binding arbitration awards, absent to a finding that an arbitration award is contrary to applicable law, appropriate regulation, Executive Order 11491, or decisions of this Office if the award involves payments to be made by the agency involved, we believe that a binding arbitration award must be given the same weight as any other exercise of administrative discretion, i.e., the authority to implement the award should be refused only if the

agency head's own decision to take the same action would be disallowed by this Office.

In that regard, section 13(b) of Executive Order 11491 provides that either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal Labor Relations Council. The exception may relate to a dispute over the facts, over the interpretation of the collective bargaining agreement, or with respect to the legality of the remedy fashioned by the arbitrator. Under 31 U.S. Code § 74, disbursing officers, or the head of any executive department or other establishment not under any of the executive departments, may apply for and the Comptroller General must render his decision upon any question involving a payment to be made by or under them. When a matter is submitted to this Office involving an arbitration award, the Comptroller General will not rule on the facts or the interpretation of the agreement and by submitting an arbitration award to this Office for a ruling on the legality of its implementation, we will assume that there is no dispute as to these matters since the agency involved did not note an exception with the Federal Labor Relations Council under section 13(b) of the Executive order. Our consideration will be limited, therefore, to the propriety of implementing the particular arbitration award in question. When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which involve matters not within the jurisdiction of this Office, it should instruct the agency involved to request a ruling from this Office as to the legality of implementation of the award.

As to the facts of this particular case, it is indicated that following the arbitrator's decision, the General Counsel of the NLRB petitioned the Federal Labor Relations Council for review of the decision. Thereafter the General

Counsel withdrew the matter from the Council for review of the decision. Thereafter the General Counsel withdrew the matter from the Council with the understanding that he would submit the issue of backpay to this Office for a decision.

Authority under which an agency may retroactively adjust an employee's compensation is contained in the Back Pay Act of 1966, codified in 5 U.S.C. § 5596, which provides, in part, as follows:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by a appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
>
> (2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The Civil Service Commission has promulgated implementing regulations to that act in title 5 of the Code of Federal Regulations, part 550, subpart H. As to whether those regulations permit an agency head to take cognizance of an arbitrator's finding that an employee has been subjected to an erroneous personnel action by his

agency and pay the employee under the Back Pay Act, the Civil Service Commission has stated, in a letter set forth, in part, in Attachment 2 to FPM Letter No. 711-71, June 3, 1973, as follows:

The regulation (5 C.F.R. 550.803) says in effect the employee is entitled to back pay when the . . . [agency head] or other appropriate authority makes a decision on his own initiative that the adverse personnel action was unjustified or unwarranted. The context of the regulation shows that the expression *on his own initiative* does not prevent him from acting on the award of an arbitrator, but only distinguishes this case from the case in which he acts on an appellate decision.

In order decision of June 25, 1974, 53 Comp. Gen. 1054, we recognized that where an arbitrator has made a finding that an agency has violated a collective bargaining agreement to the detriment of an employee, the agency head may accept that finding and award the employee backpay for the period of the erroneous personnel action so long as the circumstances surrounding the erroneous action fall within the criteria set forth in the Back Pay Act and the implementing regulations. The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. § 550.803 (d) and (e) which provide:

> (d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.
>
> (e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separation for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods

of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

We believe that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that therefore the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for the violation of the agreement. In that regard, to the extent that previous decisions of this Office may have been interpreted as holding to the contrary, such decisions will no longer be followed.

In the present case, the agency failed to carry out what had become, through its inclusion in a collective bargaining agreement, a nondiscretionary agency policy by placing an employee from outside the agency in a position for which there were four applicants within the agency qualified for the position, one of whom the General Counsel admits would have been originally promoted to the position had the agency adhered to its policy. Further, the agency subsequently recognized that the policy had not been followed and selected one of those four agency employees to the position. Since in this particular case the agency has admitted that had it not been for the unjustified or unwarranted personnel action the employee later promoted to the position would have been promoted originally, we would have no objection to the agency at this time processing a retroactive promotion and paying the appropriate backpay.

As to our decisions concerning retroactive promotions and backpay cited by the General Counsel of the NLRB, none are for application under the facts of this case. In 32 Comp. Gen. 527 (1953) and 33 *id.* 140 (1953) we were concerned with statutory and regulatory language which,

by its terms, was for prospective application only. The decision in 50 Comp. Gen. 850 (1971) was based on the fact that in that case the agency had retained the discretion to set the effective date of promotions and there was no basis for this Office giving a retroactive promotion pursuant to an *advisory* arbitration award to a date prior to the one set by the agency. Further, that case involved application of Executive Order 10988, January 17, 1962, which was revoked by Executive Order 11491, under which the policies set forth in this decision have been formulated.

However, our decision in this matter should not be construed to mean that any provision in a collective bargaining agreement automatically becomes a nondiscretionary agency policy. As previously indicated, under Executive Order 11491, agreements are limited as to what they may contain and agencies have certain retained rights which they may not bargain away. Section 12(b)(2) of the Executive order provides that management officials must retain the right to "hire promote, transfer, assign, and retain employees within the agency, and to suspend, demote, discharge, or to take other disciplinary action against employees." Since this case was withdrawn from the Federal Labor Relations Council in order to submit the question of backpay to this Office, it does not appear that the Council ruled on the question of whether or not the promotion provision in the agreement, or the arbitrator's award thereunder, violated the retained right of the agency to promote employees. However, while the question is essentially one for the Council, we note that the agreement and the award would appear to be proper since the provision in the agreement is in consonance with subchapter 3-3e of chapter 335 of the Federal Personnel Manual which provides that it is within the discretion of an agency to limit its consideration of applicants for positions to employees within the organization of applicants for positions only instructed the agency to do that [sic].

We also want to stress that our decision herein should not be construed as meaning that any award of an arbitrator, whether or not made pursuant to a binding arbitration agreement, may automatically be implemented by the agency involved. While we, like the General Counsel of the NLRB and the other parties who submitted briefs in this matter, are concerned with giving meaningful effect to Executive Order 11491, we point out that arbitrator's awards must be consistent with law, regulation, and, where the award involves, directly or indirectly, the payment of money, decisions of this Office. When there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought.

54 Comp. Gen. 435 (1974)
In the matter of a retroactive promotion with backpay pursuant to arbitration award, December 2, 1974:

This matter involves a request submitted by the American Federation of Government Employees (AFGE) on behalf of Mr. Russell D. Mikel for a decision as to whether an arbitrator's award granting Mr. Mikel a retroactive promotion and commensurate backpay may properly be implemented.

The arbitrator's award was rendered as the result of a grievance filed by Mr. Mikel (now retired) and pursuant to a collective bargaining agreement between Mr. Mikel's agency, the Defense Supply Agency (DSA), and Local 2449 of AFGE. The arbitrator found that DSA had wrongfully denied a promotion opportunity to Mr. Mikel, a GS-12 employee, and that had he not been wrongfully denied such opportunity he would, in fact, have been promoted. Therefore, the arbitrator concluded that Mr. Mikel should "be upgraded to the GS-13 level, step 10, retroactive to July 1, 1969, and be made whole accordingly."

Upon receipt of the arbitrator's award, DSA promoted, Mr. Mikel from GS-12 to GS-13, Step 5, effective on June 17, 1973. The agency did not contest the finding that Mr. Mikel was wrongfully denied a promotion opportunity or that he should now receive a promotion. However, because the agency had doubt about its legal authority to execute the "make whole" provisions of the award, it filed a petition with the Federal Labor Relations Council for a review of those portions of the award which directed DSA (1) to promote Mr. Mikel retroactively to July 1, 1969; and (2) to promote him to GS-13, step 10. In appealing the award, DSA stated in its petition:

> Since the arbitrator's basic determination that Mr. Mikel was wrongfully denied a promotion opportunity is not being challenged, there is no need

> to summarize the facts of the case except as they have a bearing upon the "make whole" provisions of the award which are subject to challenge.

The agency contended that compliance with the retroactivity portion of the award and the order to promote to step 10 would violate both the Back Pay Act and the law fixing the in-grade step when a promotion to a higher grade is made.

The Council's decision on the appeal, FLRC No. 73A-51, was issued September 24, 1974. The facts in the case and the arbitrator's findings as to whether the matters were arbitrable are stated in the Council's decision as follows:

> In May 1969, Russell D. Mikel, Management Technician, GS-12, applied for each of two GS-13 positions, but was found not to meet the eligibility requirements. As to one of these positions, the agency conceded that Mikel had not been referred to the selecting official and, hence, had been denied an opportunity for consideration in competition with other qualified candidates. Mikel filed a grievance and, as corrective action, the agency directed that Mikel be given "priority consideration"[1] for the next position for which he

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[1] "Priority consideration" and the treatment of employees entitled thereto, are covered by Part II, Article Q, Section 10, of the collective bargaining agreement, which provides:

PART II -- ARTICLE Q. PROMOTIONS AND FILLING POSITION VACANCIES

Section 10. Employees entitled to priority consideration as defined in the FPM will received such consideration including a personal interview prior to official announcement... of the vacancy. Nonselection

was qualified. Subsequently, Mikel was considered for another GS-13 vacancy; however, he was not considered by the selecting official because he had

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of an employee having the right to priority consideration must be justified in writing. An employee with such rights who is nonselected shall automatically be included on all promotion registers for which he is qualified, developed as a result of official announcement, and will be rated and ranked by the panel in the same manner as all other applicants.
FPM ch. 335, sec. 6 4e, provides:

c. Action involving nonselected employees

* * * * * * * * *

(2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. An employee may be selected on the basis of this consideration as an exception to competitive promotion procedures (see section 4-3f).

On February 5, 1973, Mikel filed a grievance grounded, as the arbitrator concluded, on two basic claims: (1) that his position had been incorrectly classified, and (2) that he had not been accorded "priority consideration" for a promotion. The grievance was submitted to arbitration.

The arbitrator determined in his opinion that the second claim in the Mikel grievance, relating to "priority consideration," was arbitrable, but the first claim was not.*

* The arbitrator determined that Mikel's first claim concerning the classification of his position was

not been ranked among the best qualified. Mikel grieved, and the agency agreed with Mikel that since the promotion panel did not rank Mikel among the best qualified, indeed "priority consideration" was not afforded for this particular vacancy. On January 30, 1970, the agency directed that Mikel receive "priority consideration" for the first two vacancies for which he was basically qualified.

Because the Back Pay Act is implemented through regulations issued by the Civil Service Commission, the Council sought the Commission's advice on the matter. The Commission, in replying to the Council, stated in part as follows:

> Technically, the question is not whether the ward violates 5 U.S.C. 5596, since there was no "unjustified or unwarranted personnel action taken." Section 550.803(e) of the Commission's regulations defines personnel action for this purpose as being any action by an authorized official of an agency which results in the withdrawal or deduction of all or any part of the pay, allowances, or differentials of an employee. The Comptroller General, in his decision at 48 Comp. Gen. 502, stated "that a positive administrative action adverse to the employee must be the basis for back pay rather than an omission or failure to take action for an improper reason."
>
> Rather, the question is whether there is a basis for the agency to approve a promotion to be effective retroactively. The Comptroller General has ruled on

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"beyond arbitral jurisdiction in view of the procedures availed of by Mikel via his appeals to the Civil Service Commission and its deposition of the appeals."

numerous occasions that promotions may not be made to take effect retroactively, except in cases where through administrative error, such as clerical error resulting in the delayed typing of the personnel action, a personnel action was not effected as originally intended.

* * * * * * * * *

The Comptroller General has also ruled that a personnel action may not be made retroactively effective so as to increase the right of an employee to compensation. (See 39 Comp. Gen. 583 and 40 *id.* 207.)

In its second exception to the award, the agency alleged that it may not fix pay on promotion at a rate which is not in accordance with law and regulation. In the instant case, the proper step would have been step 4, if the promotion could have been legally effected retroactively to July 1, 1969; however, neither citation would have permitted the agency to fix the pay at the step 10.

For the reasons set forth above, the arbitrator's award in this case may not be implemented.

In accordance with the Commission's reply, the Council modified the arbitrator's award by striking that portion of the award which ordered that Mr. Mikel be promoted to the GS-13 level, step 10, retroactive to July 1, 1969, and that he be made whole accordingly.

In our decision of October 31, 1974, 54 Comp. Gen. 312, we pointed out that under section 13(b) of Executive Order 11491, as amended by Executive Order 11616 of August 26, 1971, 3 Code of Federal Regulations (C.F.R.) 254, either an agency or an exclusive representative may file an exception to an arbitrator's award with the Federal Labor Relations Council. The exception may relate to a

dispute over the facts, over the interpretation of the collective bargaining agreement, or with respect to the legality of the remedy fashioned by the arbitrator. We further stated that when a matter is submitted to our Office for a ruling as to the legality of the implementation of a particular arbitration award, we will not rule on the facts or the interpretation of the agreement and our consideration will be limited to the propriety of implementing the award in question.

Although we are not, strictly speaking, an avenue of appeal from decisions of the Federal Labor Relations Council, we are obligated by law to make final determinations regarding the legality of expenditures of appropriated funds. Therefore, whenever there is a question as to whether an arbitrator's award may properly be implemented and involves, either directly or indirectly, the payment of money, a decision in the matter should be requested from our Office. In that regard, we also pointed out in 54 Comp. Gen. 312, *supra*, that whenever a matter is submitted directly to this Office for a ruling as to the legality of implementation of an arbitrator's award and an exception is not first filed with the Federal Labor Relations Council under section 13(b) of Executive Order 11491, we will assume that there is no dispute as to the facts or the interpretation of the agreement as determined by the arbitrator and will, therefore, limit our consideration to the propriety of implementing the particular arbitration award in question. When an agency does choose to first file an exception with the Council, if the Council is unsure as to whether the arbitration award may properly be implemented in accordance with the decisions of this Office, it should either submit the matter directly to this Office for decision or, after ruling on any other issues involved in the exception which pertain to matters not within the jurisdiction of this Office, it should instruct the agency to request a ruling from this Office as to the legality of implementation of the award.

Because the holding in 54 Comp. Gen. 312, *supra*, which authorized an agency to process a retroactive promotion and pay the appropriate backpay to an employee who had not been promoted as the result of a violation of a provision in a collective bargaining agreement, was rendered subsequent to the Council's decision in Mr. Mikel's case and appears to be applicable to his case, we have agreed to review Mr. Mikel's claim as it pertains to the question of whether the arbitrator's award granting him a retroactive promotion and backpay may be implemented.

In the above-cited case, we referred to the Back Pay Act of 1966, codified in 5 U.S. Code 5596, which provides, in part, as follows:

> (b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee--
>
> (1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and
>
> (2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

In that case, we also referred to our decision of June 25, 1974, 53 Comp. Gen. 1054, wherein we recognized that where an arbitrator has made a finding that an agency has violated a collective bargaining agreement to the detriment of an employee, the agency head may accept that finding and award the employee backpay for the period of the erroneous personnel action so long as the circumstance surrounding the erroneous personnel action fall within the criteria set forth in the Back Pay Act and the implementing regulations. The criteria for an unjustified or unwarranted personnel action are set forth in 5 C.F.R. 550.803 (d) and (e) which provide:

> (d) To be unjustified or unwarranted, a personnel action must be determined to be improper or erroneous on the basis of either substantive or procedural defects after consideration of the equitable, legal, and procedural elements involved in the personnel action.
>
> (e) A personnel action referred to in section 5596 of title 5, United States Code, and this subpart is any action by an authorized official of an agency which results in the withdrawal or reduction of all or any part of the pay allowances, or differentials of an employee and includes, but is not limited to, separations for any reason (including retirement), suspensions, furloughs without pay, demotions, reductions in pay, and periods of enforced paid leave whether or not connected with an adverse action covered by Part 752 of this chapter.

In 54 Comp. Gen. 312, *supra*, we held that a violation of a provision in a collective bargaining agreement, so long as that provision is properly includable in the agreement, which causes an employee to lose pay, allowances or differentials, is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay and that, therefore, the Back Pay Act is the appropriate statutory authority for compensating the employee for the pay, allowances or differentials he would have received but for

the violation of the agreement. In the present case the arbitrator found that the agency had agreed to give Mr. Mikel priority consideration for subsequent suitable GS-13 vacancies in accordance with the Federal Personnel Manual and the collective bargaining agreement following their acknowledgment that, through an error, Mr. Mikel had earlier been denied an opportunity for consideration for a given vacant GS-13 position, and that the agency had not subsequently accorded Mr. Mikel the priority consideration required in the circumstances. He also found that had Mr. Mikel been afforded such priority consideration, *he would have been promoted.* Under section 12(b)(2) of Executive Order 11491, management officials of an agency retain the right to "hire, promote, transfer, assign, and retain employees within the agency, and to suspend, demote, discharge, or to take other disciplinary action against employees." We have some question as to whether the finding by the arbitrator that Mr. Mikel would have been promoted is properly within his authority under the Executive order. However, of prime importance in that regard is the fact that the agency did not take an exception to the arbitrator's finding that Mr. Mikel "would have been promoted," questioning only their authority to grant the ordered retroactive promotion and backpay. We believe that the fact that the agency chose not to take an exception to the finding that Mr. Mikel would have been promoted but for its denial of priority consideration was tantamount to an agency determination that but for their violation of the agreement in not giving Mr. Mikel priority consideration after they had ordered he be given it, he would have been promoted. Therefore, in accordance with our decision 54 Comp. Gen. 312, *supra*, we would have no objection to processing a retroactive promotion for Mr. Mikel and paying the appropriate backpay.

As to the date on which Mr. Mikel's retroactive promotion should be effective, there is no clear indication in the arbitrator's award as to the reason for his choosing July 1, 1969, as the effective date of the award. In that regard,

while we wish to give the maximum effect possible to arbitration awards, such awards must be in conformance with applicable laws and regulations. We are aware of no legal basis under which Mr. Mikel could be retroactively promoted back to the specific date selected by the arbitrator. Since the award was based upon the arbitrator's determination that the agency had not accorded Mr. Mikel the consideration that was required in the circumstances for various GS-13 positions following the agency mandate that he be given "priority consideration" for all suitable GS-13 positions, we believe that the effective date of Mr. Mikel's promotion must conform with one of the dates on which a position was filled for which Mr. Mikel was entitled to priority consideration but did not recieve it. The Defense Supply Agency, in its petition for review of the arbitrator's award to the Federal Labor Relations Council, states that the first position for which Mr. Mikel was entitled to priority consideration but not selected was filled on June 2, 1970. They appear to base this contention on the fact that the position filled June 2, 1970, was the first such position for which Mr. Mikel was entitled to priority consideration following the January 30, 1970, mandate by the Deputy Director of DSA that Mr. Mikel be given priority consideration for the first two vacancies for which he was basically qualified. The AFGE, on the other hand, states that the dates and facts presented by DSA in their request for review are contrary to the dates and facts presented and tested in the arbitration proceedings and that, in fact, Mr. Mikel was entitled to priority consideration for a GS-13 position that was open in June 1969. This position was apparently an Administrative Officer vacancy that was filled July 22, 1969. The record in the matter and the statement of facts by the Federal Labor Relations Council in its decision would appear to support the contention of AFGE. Those facts indicate that in May 1969 Mr. Mikel was not found to meet the eligibility requirements for two GS-13 positions. As to one of those positions, the agency conceded that Mr. Mikel had not been referred to the selecting official and, hence, directed that he be given priority

consideration for the next position for which he was qualified. When subsequently Mr. Mikel was not selected for a vacant GS-13 position (apparently the Administrative Officer position, *supra*) the agency agreed that he had not been given priority consideration and then ordered (in the January 30, 1970, mandate) that he be given such consideration for the next *two* vacancies for which he was qualified. The fact that Mr. Mikel was entitled to priority consideration for a position prior to the June 2, 1970, position is further supported by the case resume which accompanied the January 30, 1970, directive of the Deputy Director of DSA. In that resume, in an item by item statement of the issues, it is stated:

> 2. Mikel contends DSASC-Z failed to properly consider his application for Program Analyst, GS-345-13 [one of the May 1969 vacancies].
>
> DSASC-Z acknowledges an error in regard to this matter and had adopted the concept of priority consideration as corrective action.
>
> 3. Mikel contends that having promised priority consideration DSASC-Z failed to provide such consideration in connection with a subsequent vacancy for Administrative Officer, GS-341-13 [apparently the position filled July 22, 1969].
>
> DSASC-Z agrees with Mikel since the promotion panel did not rank Mikel among the five best qualified, *indeed priority consideration was not afforded for this particular vacancy but is still promised for a future appropriated vacancy.* [Italic supplied.]

Based on the foregoing and in accordance with the arbitrator's finding that Mr. Mikel was not afforded priority consideration for any of the positions to which he was entitled, we believe that the appropriate date back to which Mr. Mikel's retroactive promotion should be made effective is July 22, 1969.

Concerning the proper step in grade GS-13 in which Mr. Mikel should be placed, there is no legal basis for

placing him in step 10 of that grade as ordered by the arbitrator. There are ten steps in the General Schedule grade, GS-13, each successive step calling for a higher salary rate. The general purpose of these within-grade steps is to permit an employee who performs satisfactory service in any given grade for fixed periods of time, such as 52, 104, or 156 weeks, without being promoted to a higher grade, to receive an increase in salary by advancing to the next highest within-grade step. The rules which govern determinations concerning the appropriate within-grade step at which any given employee may be classified and paid are set forth in sections 5335 and 5336 of Title 5, U.S. Code. In addition, section 5334(b) of Title 5 provides that "An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the higher grade which exceeds his existing rate of basic pay by not less than two step-increases of the grade from which he is promoted or transferred." The agency indicates that on July 22, 1969, Mr. Mikel's grade and step were GS-12, step 7, and that if he had been promoted on that date he would have been promoted to GS-13, step 4. Since there is no legal basis for placing Mr. Mikel in a higher step of grade GS-13 than he would have been placed in, if promoted originally, Mr. Mikel should be retroactively promoted in accordance with the foregoing to GS-13, step 4.

It is noted that Mr. Mikel has retired and his annuity was based on lower pay rates than those provided in the arbitrator's award. Any request for adjustment of his annuity resulting from implementation of the award and this decision is for referral to the United States Civil Service Commission which has jurisdiction in the matter.

Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

(2)

No. 90-1733

In the Supreme Court of the United States

OCTOBER TERM, 1991

JAMES E. BROWN AND WELLINGTON MITCHELL, PETITIONERS

v.

MICHAEL P.W. STONE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, authorizes a court to award back pay as a remedy for employment discrimination by the federal government, but does not waive sovereign immunity with respect to prejudgment interest on such an award. The question presented is whether the Back Pay Act, 5 U.S.C. 5596(b), waives the sovereign immunity of the United States with respect to prejudgment interest on a back pay award, in an action under Title VII, that is based on a determination that the plaintiff would have obtained a discretionary promotion in the absence of unlawful discrimination.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1733

JAMES E. BROWN AND WELLINGTON MITCHELL, PETITIONERS

v.

MICHAEL P.W. STONE, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 918 F.2d 214. The opinion of the district court in *Brown* v. *Marsh* (Pet. App. 25a-39a) is reported at 713 F. Supp. 20. The opinion of the district court in *Mitchell* v. *Secretary of Commerce* (Pet. App. 51a-64a) is reported at 715 F. Supp. 409. (The two cases were consolidated in the court of appeals.)

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1990. A petition for rehearing was denied on February 12, 1991. The petition for a writ of certiorari was filed on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are federal employees who brought separate actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16. In both cases, the district court found that the government had engaged in discrimination prohibited by Title VII. The district court awarded petitioner James E. Brown promotions retroactive to 1975 and back pay. Pet. App. 2a, 34a-35a, 39a. The court awarded petitioner Wellington Mitchell a promotion retroactive to 1980 and back pay. *Id.* at 2a, 65a-66a.

Both petitioners sought prejudgment interest on their back pay awards. In general, "interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest," *Library of Congress* v. *Shaw*, 478 U.S. 310, 311 (1986), and Title VII itself does not "waive the Government's traditional immunity from interest," *id.* at 323. Petitioners argued, however, that the Back Pay Act furnished the requisite waiver. That statute provides, in pertinent part:

> (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination * * * is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee –
>
> (A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect –
>
> (i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if

> the personnel action had not occurred, less any amounts earned by the employee through other employment during that period[.] * * *
>
> * * * * *
>
> (2)(A) An amount payable under paragraph (1)(A)(i) of this subsection shall be payable with interest.

5 U.S.C. 5596(b).[1] As the result of a 1978 amendment, the term "personnel action" includes "the omission or failure to take an action or confer a benefit." 5 U.S.C. 5596(b)(4).

In both cases, the district court denied petitioners' claims for prejudgment interest. Pet. App. 35a-37a, 53a-57a. Although it was "prepared to accept * * * as a general proposition" that the Back Pay Act was potentially applicable to back pay awards under Title VII (*id.* at 54a), the court concluded that the Act was inapplicable to back pay arising from the denial of a promotion. The court reasoned that withholding a promotion does not result in the "withdrawal or reduction" of an employee's compensation. *Id.* at 36a-37a, 56a.

2. The court of appeals consolidated the two cases and affirmed. Pet. App. 1a-22a. At the outset, the court rejected the government's contention that the Back Pay Act may not be employed in Title VII actions to supplement the relief authorized by Title VII itself. The court ruled that the two statutes "are most sensibly read as complementary" and that "the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards." *Id.* at 7a.

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[1] The provision authorizing payment of prejudgment interest, 5 U.S.C. 5596(b)(2)(A), was enacted in 1987. Pub. L. No. 100-202, § 623, 101 Stat. 1329-428 to 1329-429. That provision applies to all actions pending on its effective date. *Ibid.*

Two members of the panel held, however, that the Back Pay Act did not authorize payment of prejudgment interest on petitioners' back pay awards. The majority interpreted the Act, as amended in 1978, "to mean that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief." Pet. App. 12a-13a. Because petitioners' back pay awards involved discretionary, competitive promotions, the majority concluded, the Back Pay Act was inapplicable, and petitioners could not rely on its waiver of sovereign immunity from an award of interest. *Id.* at 13a-14a.

In order to recover under the Act, the majority explained, a federal employee "must be found 'to have been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of [his or her] compensation.*'" Pet. App. 8a (quoting 5 U.S.C. 5596(b)(1)) (bracketed material added by court). The majority noted that prior to the 1978 amendment, this Court had construed the Back Pay Act to "grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." Pet. App. 8a (quoting *United States* v. *Testan*, 424 U.S. 392, 407 (1976)). The 1978 amendment, the majority determined, was not intended to extend the statute to claims that *discretionary* promotions had been unlawfully withheld, but rather to mandatory promotions—promotions that were part of the employee's "duly appointed emoluments."

The majority explained that "the 1978 amendment must be read in the context of the Act as a whole. The amendment's clarification of the term 'personnel action' to include 'failure . . . to confer a benefit' left untouched the condition that the employee suffer a 'withdrawal' of or 'reduction' in compensation." Pet. App. 9a. Noting that waivers of sovereign immunity must be strictly construed, the

majority declined to construe the Act to require "that any unlawful failure to promote involves the 'withdrawal or reduction' of compensation because the employee wrongfully denied promotion does not receive money that he or she otherwise would have." *Ibid.*

Rather, the majority found, "Congress intended the 1978 amendment to cover unlawful failures to promote of a certain, precisely limited, kind." Pet. App. 10a. The majority found that the 1978 amendment was intended to codify an interpretation, reflected in contemporaneous administrative rulings and regulations, that the statute "encompasses non-competitive, mandatory promotions, not the competitive promotions at issue here." *Ibid.* The majority found additional support for this interpretation in *Spagnola* v. *Stockman*, 732 F.2d 908 (Fed. Cir. 1984). Pet. App. 12a-13a.

Judge Wald dissented from the determination that the Back Pay Act is inapplicable to discretionary promotions. She would have held that the 1978 amendment extended the scope of the Back Pay Act to "all cases involving an 'unjustified or unwarranted' denial of promotion under applicable law, regulation, or collective bargaining agreement, including discriminatory denials of promotions under Title VII." Pet. App. 22a.

ARGUMENT

Although it remains our position that the Back Pay Act may not properly be employed to supplement the remedies available under Title VII, the court of appeals was fully justified in refusing to extend the Act to the discretionary promotions at issue in this case in any event. There is no conflict among the courts of appeals on whether the Back Pay Act applies in this setting. Consequently, further review is not warranted.

1. a. "In the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Congress* v. *Shaw*, 478 U.S. at 314. Indeed, in the context of this no-interest rule, the general rule that waivers of sovereign immunity are narrowly construed bears "an added gloss of strictness." *Id.* at 318. There can be

> no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Ibid. (quoting *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947)).

When it extended Title VII to federal government employment, "Congress did not waive the Government's traditional immunity from interest." *Library of Congress* v. *Shaw*, 478 U.S. at 323. Petitioners seek to compensate for that omission by engrafting the Back Pay Act's provision for prejudgment interest onto Title VII. By its terms, however, the former statute provides for back pay (and thus for prejudgment interest) only in the event of "an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee." 5 U.S.C. 5596(b)(1). That language, even as supplemented by the 1978 amendment to the statute, cannot fairly be read to encompass the denial of a discretionary promotion.

In *United States* v. *Testan*, 424 U.S. 392, 405-407 (1976), the plaintiffs alleged that their jobs had been improperly classified—*i.e.*, that they were performing duties and

responsibilities characteristic of GS-14 positions, but had been classified only as GS-13 employees. This Court held that the Back Pay Act was inapplicable to such a claim. After reviewing the history of remedies available to federal employees for allegedly unlawful personnel actions, the Court noted that the general rule has been "that the federal employee is entitled to receive only the salary of the position to which he was appointed, even though he may have performed the duties of another position or claims that he should have been placed in a higher grade." *Id.* at 406. The Court found that the Back Pay Act "did not override this rule, or depart from it." *Ibid.* Rather, the Court concluded, "the Back Pay Act, as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." *Id.* at 407.

b. Petitioners do not contend, nor could they, that their claims would fall within the Back Pay Act as construed in *Testan*. Notwithstanding the district court's finding that they would have attained higher grades in the absence of discrimination, they were not "subjected to a reduction in their duly appointed emoluments or position." Rather, petitioners' basic contention is that the 1978 amendment to the Act—which defined "personnel action" to include "the omission or failure to take an action or confer a benefit," 5 U.S.C. 5596(b)(4)—abrogated the general limitation recognized in *Testan*.[2] As the majority noted, that contention overlooks the fact that the 1978 amendment made no change in the operative statutory language. It is still necessary, as before, that an unlawful personnel action result in a "withdrawal or reduction" of the employee's compensation.

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[2] The holding in *Testan* was codified in 5 U.S.C. 5596(b)(3).

The legislative history of the amendment confirms, moreover, that the 1978 amendment was not intended to extend the statute to claims involving discretionary promotions. Rather, the amendment was intended to codify an interpretation of the statute "that ha[d] been given the Back Pay Act * * * by the Comptroller General and the Civil Service Commission through decisions and regulations." S. Rep. No. 969, 95th Cong., 2d Sess. 114 (1978). Under that interpretation, the Act had been held to apply to unlawful failures to award "noncompetitive, mandatory promotions" (Pet. App. 10a). That type of personnel action, because it entails withholding of compensation that an employee is legally entitled to receive, does result in the "withdrawal" of compensation that is legally owed.

For instance, in *In re John Cahill*, 58 Comp. Gen. 59, 61-62 (1978), the Comptroller General stated (emphasis added):

> [W]hile employees have no vested right to promotion at any specific time, an agency, by negotiation of a collective-bargaining agreement or by promulgation of a regulation, *may limit its discretion so that under specified conditions it becomes mandatory to make a promotion* on an ascertainable date.
>
> * * * * *
>
> The violation of such a *mandatory provision* in a negotiated agreement which causes an employee to lose pay, allowances or differentials may be found to be an unjustified or unwarranted personnel action under the Back Pay Act * * *.

In the same vein, Civil Service Commission regulations in effect in 1978 defined an "unjustified or unwarranted personnel action" to include an "omission * * * which it is subsequently determined violated or improperly applied the

requirements of a *nondiscretionary provision*, * * * , and thereby resulted in the withdrawal, reduction, or denial of all or any part of the [compensation] otherwise due an employee." 5 C.F.R. 550.802 (1978) (emphasis added). "Nondiscretionary provision" was defined by those regulations to mean "any provision of law, Executive order, regulation, personnel policy issued by an agency, or collective bargaining agreement that *requires an agency to take a prescribed action under stated conditions or criteria.*" *Ibid.* (emphasis added).[3] This interpretation of the Back Pay Act, which the 1978 amendment codified, limits the statute to promotions that an agency is legally obligated to award.[4]

The court-ordered promotions (and accompanying back pay) that petitioners received under Title VII are not of that nature. The district court did not find that any statute, regulation, or collective bargaining agreement required the government to promote petitioners to the positions they

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[3] The current regulations define "unjustified or unwarranted personnel action" as (5 C.F.R. 550.803):

> an act of commission or an action of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

[4] The agency decisions cited by petitioners (Pet. 18-19, 25 & n.34) are entirely consistent with *In re John Cahill*, *supra*. For instance, in *Veterans Administration Hosp.*, 4 F.L.R.A. 419, 424 (1980), the FLRA held that the Back Pay Act applied to a case in which the agency violated a collective bargaining agreement mandating merit promotions. Accord 54 Comp. Gen. 312 (1974) (reprinted at Pet. App. 77a) ("agency failed to carry out what had become, through its inclusion in a collective bargaining agreement, a non-discretionary agency policy").

attained as a result of the court's decrees. Rather, after concluding that the government had discriminated against petitioners, the court made findings regarding how the government probably would have acted had there been no discrimination. A *reconstruction* of how the government would have acted toward petitioners, undertaken for the purpose of fashioning remedial decrees eliminating the effects of past discrimination, is simply not the same thing as a legal determination that the government had a mandatory obligation to award a promotion.

Petitioners' failure to recognize that fundamental distinction is a flaw that pervades their argument. It is not enough for petitioners to demonstrate that the Back Pay Act has been applied in situations in which a court has found that a plaintiff "would have" obtained a particular position "but for" a failure to comply with a statute. See, *e.g.*, Pet. 12, 15, 22-23. That description fits two very different scenarios: (1) a situation in which a court finds that an agency violated a statute or regulation prescribing a particular course of action and (2) a situation in which a court finds that an agency has allowed an impermissible consideration to enter a discretionary decision and, in fashioning a remedy, undertakes to reconstruct what would have happened if that consideration had been absent. The administrative interpretations embodied in the 1978 amendment were limited to the first scenario. Petitioners' claims follow the second. Nothing in the language or legislative history of the 1978 amendment to the Back Pay Act suggests an intention to encompass both types of claims.[5]

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[5] In particular, the fact that the Senate Report accompanying the 1978 amendment suggested an intention to cover a "denial [of], or denial of an increase in," an employee's pay (S. Rep. No. 969, *supra*, at 115) does not suggest that Congress envisaged claims like petitioners'. That recitation of the types of actions encompassed by the amendment is

c. Contrary to petitioners' contention (Pet. App. 12-13, 22-23), there is no conflict between the decision in this case and decisions of other courts of appeals. No court of appeals has awarded relief under the Back Pay Act to a plaintiff in petitioners' position. Moreover, the courts of appeals have been consistent in their interpretation of the Back Pay Act.

In *Naekel* v. *Department of Transportation*, 850 F.2d 682, 683 (1988), the Federal Circuit held that an air traffic controller who had been unlawfully discharged was not entitled to back pay corresponding to discretionary promotions that he argued he would have received had he remained continuously employed. The court explained that the controller "neither demonstrated that any statute, regulation or collective bargaining agreement mandated his promotion to these levels during the interim period, nor presented facts that would establish a clear entitlement to retroactive promotions." To sustain that burden, the court continued, the plaintiff was required to demonstrate "a *reduction* in his duly *appointed* or *authorized* position caused by the adverse personnel action." *Ibid.*[6]

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entirely consistent with coverage of mandatory promotions, but exclusion of discretionary promotions.

The 1978 amendment could not have been drafted with the specific objective of enhancing the relief available under Title VII. It was not until 1987 that the Back Pay Act was amended to provide for prejudgment interest. See note 1, *supra*. Until that point, the Back Pay Act authorized no relief that was not already available to successful Title VII litigants under Title VII.

[6] *Kellus* v. *United States*, 13 Cl. Ct. 538 (1987), has been overruled to the extent it is inconsistent with *Naeckel*.

As petitioner notes, a few district court decisions have relied on the Back Pay Act as a basis for awarding prejudgment interest in actions under Title VII. *Smith* v. *Brady*, 744 F. Supp. 925 (N.D. Cal. 1990); *Parker* v. *Burnley*, 693 F. Supp. 1138, 1153 (N.D. Ga. 1988). See also *Rollins* v. *Bennett*, 48 F.E.P. Cas. (BNA) 1172, 1175 (W.D. Wash. 1988) (ADEA action). But see *Hearn* v. *Turnage*, 739 F. Supp. 1312,

Similarly, in *Olsen* v. *Arrington*, 621 F.2d 363 (10th Cir. 1980), an employee who had won reinstatement argued that he would have been promoted had he not been unlawfully separated from the government. The Tenth Circuit found that the Back Pay Act did not reach such a claim, explaining (*id.* at 366):

> We do not think [the Act] gives the courts the power * * * to intrude into areas within an agency's discretion. We find, therefore, that the [lower] court had no power to grant plaintiff a retroactive promotion, nor to award back pay at a rate higher than for the grade level held by him at the time of separation.

Accord *Spagnola* v. *Stockman*, 732 F.2d at 912 ("the 1978 amendment [to the Back Pay Act] was *not* designed to provide payment for all actions which should or might well have been taken, but only for those payments or benefits which were *required* by law"); *Power* v. *United States*, 597 F.2d 258, 262 (Ct. Cl. 1979), cert. denied, 444 U.S. 1044 (1980).

The standards applied in these cases are consistent with the majority's interpretation of the Back Pay Act in this case. There is no conflict among the courts of appeals calling for this Court's review.

2. The judgment below may also be sustained on the alternative ground that the Back Pay Act is not available in any event to supplement the relief available under Title VII. See *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986). As we argued below and continue to believe, the Back Pay Act authorizes payment of prejudgment interest only on sums paid "under" the Back Pay Act itself. See 5 U.S.C. 5596(b)(2)(A) (authorizing payment of interest on "[a]n amount payable under paragraph (1)(A)(i)

1313 (E.D. Wis. 1990). A conflict arising only from district court decisions, however, does not ordinarily warrant this Court's review.

of this subsection"). Employment discrimination awards, however, are paid "under" the pertinent employment discrimination statute and not "under" the Back Pay Act. Indeed, in *Brown* v. *GSA*, 425 U.S. 820, 835 (1976), this Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." See *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366 (1979). Thus, a Title VII award can never be deemed to be made "under" any remedial scheme other than that set forth in Title VII. Since the Back Pay Act is not available to a Title VII litigant, its waiver of sovereign immunity is also not available.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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REPLY BRIEF OF PETITIONERS

The respondents concede that the Back Pay Act ("Act") has been applied to employees who would have been promoted absent an agency's failure to comply with the law. Opp. cert. 10. But, they endeavor to distinguish petitioners' promotions by offering what they call a "fundamental distinction" between promotions denied in violation of prescriptive laws, of which they provide no examples, and those denied in violation of proscriptive laws such as Title VII. *Id.* Respondents' contention that back pay is available in the former scenario, but not in the latter, finds no support in the authority construing the Back Pay Act's coverage, and displays a striking misunderstanding of Title VII jurisprudence. Ultimately, respondents' position that *United States v. Testan*, 424 U.S. 392 (1976), bars Back Pay Act coverage of promotion denials cannot be sustained.

The government's effort to minimize the split in authority concerning the Act's coverage of wrongfully withheld promotions is equally unavailing. Not only does the decision below call into question agency interpretations of the Act

stretching back to the early 1970s, it is also inconsistent with the approaches to the issue taken by the Federal and Tenth Circuits.

1. Petitioners have demonstrated that interpretations of the Act by the Comptroller General and the Civil Service Commission ("CSC")—expressly relied upon by Congress when it amended the Act in 1978—authorized back pay for denials of competitive promotions where employees would have been promoted absent a violation of applicable law.[1] *See* Pet. 13-20. Yet, according to respondents, such showing is "not enough" to demonstrate that the Back Pay Act should apply to the denial of petitioners' promotions. Opp. cert. 10. The reason, respondents assert, is that there are two "very different" scenarios in which the denial of competitive promotions occur. Opp. cert. 10. They are (1) when an agency violates a statute prescribing a particular course of conduct, and (2) when an agency violates a statute prohibiting a particular course of conduct, such as considering race in a competitive promotion decision. The government states that while the Back Pay Act affords relief under the first scenario, it provides no coverage for promotions denied under the second.

No authority is cited for the distinction that the government propounds. Nor, does authority exist to support this distinction. An examination of the Comptroller General decisions and the regulations and interpretations of the Act issued by the CSC—a task notably eschewed by respondents—indicates that these authorities never recognized a distinction between prescriptive and proscriptive provisions when awarding back pay for denials of competitive promotions. Indeed, to allow the award of back pay to turn on a determination whether the law violated by the offending conduct is set forth affirmatively or negatively would plainly elevate form over substance since any legal rule can be drafted

[1] Although review is sought from orders denying awards of prejudgment interest, the issue presented by this petition, and the inquiry that led to the denial of prejudgment interest below, is whether the Back Pay Act authorizes the award of back pay for the unlawful denial of competitive promotions.

in prescriptive as well as proscriptive language. Just as there is no substantive difference between a law governing promotions that states "The agency shall consider only a candidate's qualifications" and one that reads "The agency shall not consider factors other than a candidate's qualifications," there can be no justification for awarding back pay here under one side of the government's distinction and not under the other.

Indeed, the administrative authorities that the respondents concede support the award of back pay under the Act are indistinguishable from the present cases. *See* Opp. cert. 9 n.4, citing *Veterans Administration Hospital v. American Fed'n of Gov't Employees*, 4 F.L.R.A. 419, 424 (1980) and 54 Comp. Gen. 312 (1974) (quotation reprinted at Pet. App. 77a).

In *Veterans*, the F.L.R.A. upheld an award of retroactive promotion and back pay to a grievant denied a competitive promotion in violation of a collective bargaining agreement. The grievant protested his lack of selection for a competitive promotion on grounds that the appraisal by his immediate supervisor lacked the independence required by the collective bargaining agreement and the selectee's military experience was given improper weight in violation of the agreement's rating procedures. 4 F.L.R.A. at 419. After concluding that relevant provisions of the collective bargaining agreement had been violated, the arbitrator "reconstructed" the selection process and determined that the "[g]rievant, who was the only other candidate rated as 'highly qualified,' would have been selected but for the improper selection. . . ."[2] *Id.* at 420. Accordingly, back pay was awarded to remedy the violation of a collective bargaining agreement whose terms were no more or less proscriptive than the provisions of Title VII.

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[2] In sustaining the award, the F.L.R.A. noted that "[it] is well established that the Back Pay Act provides the appropriate authority to remedy an unjustified or unwarranted personnel action that has denied an aggrieved employee a promotion that the employee would otherwise have received." *Id.* at 424. The Authority also rejected the Veteran Administration's argument that *United States v. Testan*, 424 U.S. 392 (1976) barred the award. As petitioners have argued here, the Authority interpreted *Testan* to hold only that the Back Pay Act provides no relief to employees alleging wrongful civil service classification. 4 F.L.R.A. at 424.

Similarly, in 54 Comp. Gen. 312 (1974), *reprinted* at Pet. App. 69a, the second authority cited with approval by the respondents, the Comptroller General affirmed an arbitrator's award of retroactive promotion and back pay under the Back Pay Act to an employee denied a competitive promotion when the agency violated a provision of the collective bargaining agreement governing its merit promotion process. The agreement created a preference in filling job vacancies that favored the selection of agency employees over comparably-qualified outside applicants. *Id.* at 314, Pet. App. 70a. Like Title VII, which bound the respondents by the force of law, this provision bound the agency upon adoption of the collective bargaining agreement of which it was part. *See id.* at 318, Pet. App. 77a. The arbitrator found that the agency had violated this provision when it filled a clerical vacancy with an applicant no better qualified than four agency candidates for the position. *Id.* at 313, Pet. App. 69a. By reconstructing the selection process and selecting the candidate who would have been chosen without the competition from outside applicants, as the collective bargaining agreement required, the agency was required to award back pay to the selectee pursuant to the Back Pay Act. *Id.* at 318-19, Pet. App. 77a-78a.

These administrative authorities, along with others set forth in the petition, clearly support coverage of the petitioners' claims. *See* Pet. 26. In *Brown v. Marsh*, Mr. Brown was denied promotions in violation of Title VII, an applicable law governing the merit promotion process, and the district court found he would have received these promotions absent the violation. Pet. App. 27a-35a. Similarly, in *Mitchell v. Secretary of Commerce*, the Department of Commerce violated Title VII when it withheld a GS-13 promotion from Mr. Mitchell that he would have received in the absence of racial discrimination. Pet. App. 62a-63a. The factual determination made by the district court below—that petitioners would have received their respective promotions absent discrimination—is identical to that made by arbitrators and approved by the Comptroller General in 54 Comp. Gen. 312 and the F.L.R.A. in *Veterans Administration Hospital.* There simply is no principled basis for distinguishing

petitioners' claims from those in which agencies denied promotions in violation of collective bargaining agreements or other binding provisions.

Nor, does *In re John Cahill*, 58 Comp. Gen. 59 (1978), on which the respondents heavily rely, dictate a different result here. *See* Opp. cert. 8, 9 n.4. In fact, in *Cahill*, the Comptroller General reaffirmed the legal standard it originally set forth in 54 Comp. Gen. 312 (1974), holding that the violation of a nondiscretionary agency policy set forth in a collective bargaining agreement "coupled with a determination that but for that violation the grievant would have been promoted at an earlier date provides a proper basis for retroactive promotion and award of back pay." 58 Comp. Gen. 59, 62 (1978). In *Cahill*, the delay in a promotion, caused by clerical error, failed to violate any provision of the collective bargaining agreement and, therefore, failed to warrant coverage by the Back Pay Act. *Id.* at 63-64. Unlike *Cahill*, where there was no right to a prompt promotion that had been violated, in the present cases the right to be free from discrimination in the making of promotions was clearly violated, which should lead to coverage by the Back Pay Act here.

2. Respondents' opposition to the award of prejudgment interest here also seems to rest on the startling and erroneous premise that an agency is not legally obligated to award a promotion denied in violation of Title VII. *See* Opp. cert. 9. The government contends that while the Back Pay Act applies to "promotions that an agency is legally obligated to award . . . [t]he court-ordered promotions (and accompanying back pay) that petitioners received under Title VII are not of that nature." *Id.* This distinction, however, contravenes decades of Title VII jurisprudence.

Because of the equitable nature of Title VII, after liability is established, retroactive relief may not be awarded without a finding that the prevailing plaintiff would have received those remedies absent the discrimination.[3] While the agencies here

[3] *See, e.g., Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763-765 (1976) (Title VII "requires that persons aggrieved by the

originally had the discretion to cancel, rather than fill, the job vacancies that were at issue, once the decisions were made to fill the vacancies, the agencies had nondiscretionary obligations under Title VII to make the selections in a nondiscriminatory manner. Where courts find that selections were conducted in a discriminatory fashion and that, in the absence of discrimination, the plaintiff would have obtained the selection, the employer is obliged to offer the denied promotion and back pay as a remedy to make the plaintiff whole.[4] In accordance with the requirements of Title VII, the district court found that respondents considered race in denying promotions to petitioners and, that if race had not been considered, the petitioners would have received the promotions in the first instance. *See* Pet. App. 27a-35a, 62-63a. Contrary to the government's assertion, the district court's award of retroactive promotions to petitioners was predicated directly on the agencies' legal duty to promote petitioners to the positions they were due.[5] *See* Opp. cert. 9.

3. The respondents also contend, erroneously, that the 1978 amendments to the Back Pay Act failed to limit *United States v. Testan*, 424 U.S. 392 (1976) to its facts. *See* Opp. cert. 6-7. But, as the petitioners have already demonstrated in their petition, in the years preceding the 1978 amendments to the Act, the Comptroller General and the CSC had adopted an

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consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."); *Albemarle v. Moody*, 422 U.S. 405, 418-420 (1975) (the district court has the duty to render a decree that will to the greatest extent possible make whole the victims of racial discrimination); *Nord v. United States Steel Corp.*, 785 F.2d 1462, 1467, 1470, 1473 & n.11 (11th Cir. 1985); *Day v. Mathews*, 530 F.2d 1083, 1085 (D.C. Cir. 1976).

[4] *See, e.g., Albemarle v. Moody*, 422 U.S. at 418-20; *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1122-23 & n.15 (3d Cir. 1988).

[5] The fact that these promotions were awarded pursuant to an order of the court does not, as the respondents seem to suggest, affect their coverage by the Back Pay Act. *See* Opp. cert. 9-10. The Act expressly contemplates that the district courts, among other entities, are "appropriate authorities" authorized to make awards pursuant to the Back Pay Act. 5 C.F.R. § 550.803 (1990).

expansive view of the "withdrawal or reduction" language in the statute. Pet. 14-16. To the extent that *Testan* was construed to apply beyond reclassification actions, it would have placed in question those administrative interpretations of the Back Pay Act. Because Congress wished to "incorporate the broader interpretation of the statute given the Back Pay Act" by the Comptroller General and CSC, and yet retain the *Testan* holding as applied to its facts, Congress codified *Testan* at the same time as it expanded the "withdrawal or reduction" language of the statute to cover certain denials of promotion. *See* Pet. 17-18, 21-22.

Respondents' contention that the administrative interpretations preceding the 1978 amendments are fully consistent with application of *Testan* to promotion denials simply makes no sense. As the court below recognized, the legislative history demonstrates that Congress intended to incorporate the broader administrative interpretations of the Act in its 1978 Amendments. Pet. App. 10a. Therefore, it should be obvious that Congress would not have taken any action with respect to the Back Pay Act unless the *Testan* decision, extended beyond its limited facts, would have been inconsistent with the broader administrative interpretations of the Back Pay Act that Congress endorsed.

4. Respondents have unduly minimized the divisions in authority governing coverage of unlawful promotion denials by the Back Pay Act. *See* Opp. cert. 11-12. In addition to the extensive administrative authorities authorizing the award of back pay to persons unlawfully denied competitive promotions,[6] the courts of appeals have split over their approach to this issue.

Not surprisingly, the respondents' treatment of this split in the circuits focuses on the outcome of their decisions, in each of which the award of back pay was denied. But, the approaches taken by the Federal and Tenth Circuits differ dramatically from the approach advanced by the District of Columbia Circuit below. Left unresolved, these differences

[6] *See* Pet. 13-20.

will result in the award of back pay against the United States by some circuits and its denial by other circuits in the same circumstances.

In *Naekel v. Department of Transportation*, the Federal Circuit denied retroactive promotions, and their accompanying back pay, to an employee who had been unlawfully discharged because he failed to demonstrate, as the Back Pay Act requires, that he would have received the promotions absent the unlawful conduct. 850 F.2d 682, 684 (1988). The court based its determination on Naekel's failure to satisfy his evidentiary burden, not on a determination that, as a matter of law, he was excluded from coverage by the Back Pay Act. *Id.* The court simply required that Naekel "establish a clear entitlement to retroactive promotions" in the absence of his unlawful termination. *Id.* at 683-84.

The Tenth Circuit has approached coverage of promotions by the Back Pay Act in an entirely different manner. In *Olsen v. Arrington*, the Tenth Circuit denied the claim for retroactive promotion of a civilian employee involuntarily removed from the Air Force. 621 F.2d 363 (1980). The court reasoned that Testan barred relief under the Back Pay Act for all denials of promotion. *Id.* at 366. According to the Tenth Circuit, federal courts simply may not "entertain suits by federal employees who claim to be entitled to a higher position." *Id.*

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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